21-196

Jan. 27. 1875

Field J

Clifford J

Davis J

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~138~~. 15-6

DANIEL GARRISON, PLAINTIFF IN ERROR,

vs.

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 10, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 438.

DANIEL GARRISON, PLAINTIFF IN ERROR,

vs.

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Daniel Garrison, plaintiff, and the mayor, aldermen, and commonalty of the city of New York, defendants, a manifest error hath happened, to the great damage of the said plaintiff Daniel Garrison, as is said, and as appears by his complaint. We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, next in precedence to the late Chief Justice, this eighth day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventy.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

b UNITED STATES OF AMERICA,
South. Dist. of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 36, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Daniel Garrison, plaintiff in error, against The Mayor, Aldermen, and Commonalty of the city of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fourth day of June, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the said United States the ninety-seventh.

[SEAL.] KENNETH G. WHITE, *Clerk, &c.*

Allowed May 8th, 1873.

L. B. WOODRUFF.

Filed May 8, '73.

REC. 438—1

1 Pleas before the judge of the circuit court of the United States for the southern district of New York, at the rooms of said court in the city of New York, in said southern district of New York, of the term of October, 1871.

Witness: WILLIAM D. SHIPMAN, *Judge.*
KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, in April term, 1871, before the judge of the circuit court of the United States for the southern district of New York, at the rooms of said court in the city of New York, in said district, came Daniel Garrison, by John C. Shaw, his attorney, and brought into the said court before the judge thereof, then there, his certain declaration against the mayor, aldermen, and commonalty of the city of New York, being in custody &c., of a plea of trespass on the case upon promises; which said declaration follows in these words.

2

3 Circuit court of the U. States, southern district of New York.

DANIEL GARRISON
against
THE MAYOR, ALDERMAN, AND COMMONALTY
of the city of New York.

Daniel Garrison, who is a citizen of the State of New Jersey, complains of the mayor, aldermen, and commonalty of the city of New York, a municipal corporation duly incorporated by that name by the laws of the State of New York, and subject to legislative authority and control, citizens of the State of New York, and having their principal place of business therein, of a plea that the said defendant rendered unto the said plaintiff the sum of forty thousand dollars, lawful money of the United States of America, with interest thereon from the twenty-
4 eighth day of April, one thousand eight hundred and seventy-one, which the said defendant to the said plaintiff owes and from him unjustly detains, being the amount of a certain award made to this plaintiff for premises taken by the said defendants for the widening and straightening of Broadway, between 34th and 59th streets, in the city of New York. For that whereas heretofore, to wit, at the time that the land hereinafter described was taken for the widening and straightening of Broadway, in the city of New York, under and by virtue of the proceedings hereinafter mentioned, this plaintiff was the lessee of all that certain piece or parcel of land hereinafter mentioned, and the owner of the several buildings standing upon the said piece or parcel of land, under and by virtue of the lease, and the several assignments thereof, hereinafter set forth.

And the plaintiff further says that one John Murtha did, on the first day of August, one thousand eight hundred and fifty-nine, by a certain indenture of lease then made between him and one William Branch, both of the city of New York, under his hand and seal, lease to the said William Branch all that certain piece of land situated at the corner of Broadway, Forty-seventh street and Seventh avenue, in the city of New York, bounded and containing as follows: Beginning at the northwest corner of Forty-seventh street and Seventh avenue, and running thence northerly along the westerly side of Seventh avenue seventy-five feet

and five inches; thence westerly, parallel with Forty-seventh street, eighty-nine feet nine inches, to the easterly side of Broadway; thence southerly, along the easterly side of Broadway, seventy-nine feet, more or less, to the northerly side of Forty-seventh street; and thence easterly, along the northerly side of Forty-seventh street, seventy feet eight inches, to the place of beginning, with the appurtenances. To have and to hold to the said William Branch and his assigns, for the term of eleven years and nine months from the first day of August, one thousand eight hundred and fifty-nine, at the yearly rent of twelve hundred dollars, it being therein agreed that the said party of the second part might remove all buildings erected on said piece or parcel of land before the expiration of said lease, or the extension thereof, therein provided; which lease was duly recorded in the office of the register of the city and county of New York, on the 28th day of February, 1860, in liber 806 of conveyances, page 160.

That thereafter and during the said term, to wit, on the second day of February, one thousand eight hundred and sixty, all the estate and interest of the said William Branch in said term, by an assignment then by him made, became vested in the Richmond Bank of Alton, Rhode Island, which assignment was duly recorded in the office of the said register of the city and county of New York, on the 7th day of February, 1860, in liber of conveyances, page 302.

That thereafter and during said term, to wit, on the twenty-seventh day of May, one thousand eight hundred and sixty-five, all the estate and interest of the said the Richmond Bank of Alton, Rhode Island, in said term, by an assignment then by it made, became vested in one John W. Stevens, which assignment was duly recorded in the office of the said register of the city and county of New York, on the 5th day of June, 1865, in liber 936 of conveyances, page 404.

That thereafter, and during said term, to wit, on the eighth day of June, one thousand eight hundred and sixty-five, all the estate and interest of the said John W. Stevens in said term, by an assignment then by him made, became vested in one William Garrison, which assignment was duly recorded in the office of the said register of the city and county of New York, on the 8th day of June, 1865, in liber 943 of conveyances, page 89.

6 That thereafter and during said term, to wit, on the first day of December, one thousand eight hundred and seventy, all the estate and interest of the said William Garrison in said term, by an assignment then by him made, became vested in the plaintiff, which assignment was duly recorded in the office of the said register of the city and county of New York, on the 12th day of December, 1870, in liber 1146 of conveyances, page 578.

And the plaintiff further says that, on the seventeenth day of May, one thousand eight hundred and sixty-nine, the legislature of the State of New York duly passed an act entitled "An act to alter the map or plan of the city of New York, and to carry the alterations into effect," to which act the plaintiff begs leave to refer.

And the plaintiff further says that, within the time limited by said act, the commissioners of Central Park therein named, laid out that part of Broadway in said city between Thirty-fourth and Fifty-ninth streets, in the manner provided by said act, and caused duplicate certificates to be made out and certified, and duplicate maps to be made out and certified, and the same to be filed in the manner provided by said act, by which maps and certificates it appeared that a portion of the said land covered by the aforesaid lease of the plaintiff was in-

cluded within that part of Broadway so laid out as aforesaid, and the same thereupon became a part of one of the streets of New York, in like manner and with the same effect as if the same had been so laid out as a public street on the map or plan of the said city, by the commissioners appointed in and by the act entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York, and for other purposes," duly passed by the legisla-
7 ture of the State of New York on the 3d day of April, 1807, to which act the plaintiff begs leave to refer.

And the plaintiff further says that, in and by said act of May 17th, 1869, it was, among other things, provided, that all acts and parts of acts now in force relative to opening, widening, closing, laying out, grading, regulating, sewering, paving, and improving streets and avenues in said city should apply to that part of Broadway as so laid out, and to all proceedings under the said act, so far as the same were applicable, except as therein otherwise provided.

That among the acts thus referred to was an act duly passed by the legislature of the city of New York, on the 9th day of April, 1813, entitled "An act to reduce several laws relating particularly to the city of New York into one act," to which act, and the several acts amendatory thereof, this plaintiff begs leave to refer.

And this plaintiff further says that, by said last-mentioned acts, it is provided, that whenever and as often as any lands, tenements, or premises shall be required for the purpose of opening any public square, place, street, or avenue, or part or section of a street or avenue, in the city of New York, it shall be lawful for the mayor, aldermen, and commonalty of the city of New York to make application to the supreme court of judicature for the appointment of commissioners of estimate and assessment, for the purpose of opening such public square, place, street, or avenue, or part or section of a street or avenue.

That said commissioners shall proceed to and make a just and equitable estimate of the loss and damage to the respective owners, lessees, parties, and persons respectively entitled unto or interested in
8 the lands, tenements, and premises so required for the purposes aforesaid, and report to the said supreme court without unnecessary delay.

That upon the coming in of the said report, signed by the said commissioners, or any two of them, the said court shall, by rule or order, after hearing any matter which may be alleged against the same, either confirm the said report, or refer the same to the same commissioners for revisal and correction, or to new commissioners to be appointed by the court.

That said report, when so confirmed, shall be final and conclusive as well upon the said mayor, aldermen, and commonalty of the city of New York as upon the owners, lessees, persons, and parties interested in and entitled unto the lands, tenements, hereditaments, and premises mentioned in the said report, and also upon all persons whomsoever; and on such final confirmation of such report by the said court, the said mayor, aldermen, and commonalty of the city of New York shall become and be seized in fee of all the said lands, tenements, hereditaments, and premises in the said report mentioned that shall or may be so required for the purpose of opening the said public square or place, street or avenue, or part or section of a street or avenue so to be opened, or for the purpose of laying out and forming the said street or public place, so to be laid out and formed, or for the purpose of extending, enlarging, or otherwise improving the street or pence feet

lic place so to be extended, enlarged, or otherwise improved, as the case may be, the same to be appropriated, converted, and used to and for such purpose accordingly; and thereupon the said mayor, aldermen, and commonalty, or any person or persons acting under their authority, may immediately, or at any time or times thereafter, take possession of the same, or any part or parts thereof, without any suit or proceeding at law for that purpose; in trust, nevertheless, that the same be appropriated and kept open for or as part of a public street, avenue, square, or place forever, in like manner as the other public streets, avenues, squares, and places in said city are and of right ought to be.

That it is further provided in and by said last-mentioned acts, that the said mayor, aldermen, and commonalty shall, within four calendar months after the confirmation of the report of the commissioners in the premises by the court, pay to the respective persons and bodies, politic or corporate, mentioned and referred to in said report, in whose favor any sum or sums of money shall be estimated and reported by the said commissioners, the respective sum or sums of money so estimated and reported in their favor, respectively; and in case of neglect or default in payment of the same within the time aforesaid, the respective person or persons, or party or parties, in whose favor the same shall be so reported, his, her, or their executors, administrators, or successors, at any time or times after application first made by him, her, or them, to the said mayor, aldermen, and commonalty in common council convened, for payment thereof, may sue for and recover the same, with lawful interest from and after the said application therefor, and the costs of the suit, in any proper form of action against the said mayor, aldermen, and commonalty, in any court having cognizance thereof, and in which it shall be sufficient to declare generally for so much money due to the plaintiff or plaintiffs therein, by virtue of said act, for premises taken for the purposes herein mentioned; and it shall be lawful for the plaintiff or plaintiffs to give any special matter in evidence under such general declaration, and this act and the report of the said commissioners, with proof of the right and title of the plaintiff or plaintiffs to the sum or sums demanded, shall be conclusive evidence in such suit or action.

And the plaintiff further says that, pursuant to the provisions of said act of May 17, 1869, and the several acts therein referred to, relative to the opening, &c., of streets in the city of New York, commissioners were duly appointed on behalf of the said mayor, aldermen, and commonalty of the city of New York, by the supreme court of the State of New York, to acquire title in their name and for public use to the lands required to widen and straighten Broadway, in said city, in the manner described in said certificates, and shown upon said maps so made and filed as aforesaid. That thereafter the said commissioners duly made their report to the said supreme court of the State of New York for the first judicial department thereof, which report was, on the twenty-eighth day of December, one thousand eight hundred and seventy, duly confirmed by the said court, upon the application of the said mayor, aldermen, and commonalty, through their duly authorized attorney, the corporation counsel of the city of New York.

That the said commissioners, in and by their said report, so made and confirmed as aforesaid, did, among other things, report that all that certain lot, piece, or parcel of land situate, lying, and being in said city of New York, and in said report particularly described, being known on the commissioner's map of damage by the numbers 132, 133, and 134,

would be required to be taken for the said widening and straightening of Broadway, as aforesaid, and that the same was subject to a certain lease thereon, (being the lease hereinbefore set forth,) owned and held by this plaintiff, who was also the owner of the several buildings standing upon said lot, and that the said commissioners had assessed
11 the loss and damage of the said plaintiff by virtue of such lease, and in consequence of the taking of said premises and buildings as aforesaid, and of the said plaintiff relinquishing all his right, title, and interest therein, at the sum of forty thousand dollars, as will more fully appear by the report of said commissioners, to which this plaintiff begs leave to refer.

And the plaintiff further says that, under and by virtue of the acts aforesaid, the said report of said commissioners, when so confirmed, became final and conclusive upon the said mayor, aldermen, and commonalty of the city of New York, as well as upon the owners, lessees, persons, and parties interested in and entitled unto the lands, tenements, hereditaments, and premises mentioned in the said report, and thereupon the said mayor, aldermen, and commonalty of the city of New York became seized in fee of all the said lands, tenements, hereditaments, and premises, in trust that the same be appropriated, kept open for and as part of a public street or avenue forever; and the right of the said plaintiff to the said award became vested in him.

And the plaintiff further says, that thereupon the said mayor, aldermen, and commonalty of the city of New York became indebted to this plaintiff in the said sum of forty thousand dollars, and were directed by the acts aforesaid to pay over the sum of money so reported by said commissioners to this complainant, within four calendar months after the confirmation of said report.

And the plaintiff further says, that the said mayor, aldermen, and commonalty of the city of New York have neglected to pay the said sum, so reported due, to this complainant, or any part thereof, although more than four calendar months have expired since the confir-
12 mation of said report; that since the expiration of said period application has been made to the said mayor, aldermen, and commonalty, in common council convened, and to the chamberlain of the city of New York, on behalf of this plaintiff, for the payment thereof, pursuant to the statute in such case made and provided, but the said mayor, aldermen, and commonalty have neglected and refused to pay the same, or any part thereof.

And the plaintiff further says that the claim upon which this action is founded was presented to the comptroller of the city of New York for adjustment, on the fifteenth day of May, one thousand eight hundred and seventy-one, and that upon a second demand, in writing, for the payment of said claim, being made upon the said comptroller after the expiration of thirty days from said first demand, said comptroller neglected and refused to make an adjustment or payment thereof.

And the plaintiff further says that by reason of the premises, and by force of the statutes hereinbefore referred to, the said defendant did then and there become liable to pay to the said plaintiff the said sum of money so reported due by the said commissioners when the said defendant should be thereunto after requested.

Nevertheless the said defendant, though often requested so to do, has not paid the said sum of forty thousand dollars above demanded, nor any part thereof, to the said plaintiff, but to do this has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of this plaintiff of the sum of forty thousand dollars, with interest from

the twenty-eighth day of April, one thousand eight hundred and seventy-one.

Wherefore he brings his suit.

13 And the said defendants thereupon, in due time, appear by Richard O'Gorman, corporation counsel, and file and serve their plea to said declaration, which said plea follows in these words, that is to say:

Circuit court of the United States, southern district of New York.

DANIEL GARRISON
ag'st
THE MAYOR, ALDERMEN, AND COMMONALTY OF the city of New York.

And the said the mayor, aldermen, and commonalty of the city of New York, defendants in this suit, by Richard O'Gorman, their attorney, come and defend the wrong and injury, when, &c., and say that they do not owe the said sum of forty thousand dollars, above demanded, or any part thereof, in manner and form as said plaintiff hath above thereof complained against them; and of this they put themselves on the country.

And for a further plea in this behalf, the said defendants, by
14 leave of the court here for this purpose first had and obtained, according to the statute in such case made and provided, say that the plaintiff ought not to have or maintain his aforesaid action against them, because they say that on the twenty-seventh day of February, one thousand eight hundred and seventy-one, the legislature of the State of New York passed an act entitled "An act in relation to the widening and straightening of Broadway, in the city of New York, and to regulate the practice in that proceeding," in and by section four of which act it was in substance enacted that within four months from the date of the order of confirmation mentioned in the declaration, to wit, December 28, 1870, the said the mayor, aldermen, and commonalty of the city of New York, might at their option move, before a justice of the supreme court in the first department, either at special term or chambers of said court, to vacate the said order theretofore made at special term confirming said report; and it was in and by said section declared to be the duty of the said court or justice, at or before whom such motion might be made, to hear the same, and if it
15 should appear to said court or justice that there was any error, mistake, irregularity, or illegal act in the said proceedings for the widening and straightening of Broadway, at any stage of the said proceedings; or if it should appear to the said court or justice that the assessment for benefit or the awards for damages, or any or either of them, had been unfair or unjust, or inequitable or oppressive, as respects said mayor, aldermen, and commonalty, or any person or persons affected thereby, the said court or justice should vacate said order of confirmation, which should thereupon be null and void, and should refer the matter back to commissioners, a majority of whom should be other than the commissioners who had acted and made said report, which was confirmed on the twenty-eighth day of December, one thousand eight hundred and seventy, as aforesaid, who should proceed to amend and correct the said report, or to make a new assessment, in whole or in part, as the said court or justice should direct and report, which report

should be made within six months after the order referring the matters to the commissioners, and should be presented for confirmation
16 to the court upon at least twenty days' notice by publication in at least two daily newspapers, published in the city of New York, and that at the time of the first publication of such notice the said commissioners should deposit in the office of the department of public works in said city, an abstract of their proposed report, showing the awards made for damages and the assessments imposed for benefit, which abstract should remain in said office, open to public inspection and examination, until the report of the said commissioners should be presented for confirmation as in said act provided, and such proceedings under said last-mentioned order, and for the confirmation of the further or other report of said commissioners, and the fees and expenses of said proceedings, should be regulated by and according to the laws then existing relating to the opening of streets and avenues in the city of New York; provided, however, that in making such corrected or new assessment and report, the said commissioners might assess any and all property which they deemed benefitted by said improvement,
17 whether the same was or was not contained within the limits or spheres excepted from assessment or benefit by the act passed May 17, 1869, (being chapter 890 of the laws of 1869,) and so much of the said last-mentioned act as provided for the exemption of any property from assessment, was by said act of February 27, 1871, repealed. That the service of notice of such motion in the manner mentioned in said act should also operate until the hearing and determination thereof as a stay of proceedings upon all suits, actions, or proceedings brought, or thereafter to be brought, against said mayor, aldermen, and commonalty, or any officer thereof, for the enforcement or collection of any award for damage made by the first-mentioned commissioners to any person or persons.

In and by section six of said act it was further, in substance, enacted that the motion aforesaid mentioned in section four thereof should be heard upon the proceedings theretofore had in the said matter, and also upon such others papers and such affidavits and proof as the said mayor, aldermen, and commonalty, and any person interested, might see fit to read, upon the hearing before the court or justice, and that the
18 said motion might be brought on, upon notice of not less than five days, by or in the name and behalf of the said mayor, aldermen, and commonalty, to be served upon the attorneys or counsel named in the order theretofore entered at special term as in said act before mentioned, and by publication of such notice in at least two newspapers, published in the city and county of New York, for at least five days previous to the time mentioned in said notice for the making of the motion, and that all proceedings authorized in said act of February 27, 1871, to be taken by the mayor, aldermen, and commonalty of the city of New York, might be taken by the mayor of said city, in the name and on behalf of the said mayor, aldermen, and commonalty.

That said act took effect and became valid and binding upon the parties to this suit, and all other persons thereby affected, on the said twenty-seventh day of February, 1871.

That pursuant to said sections of said act, and before the expiration of four months from the date of said order of confirmation, these
19 defendants, pursuant to said section four of said act, moved before a justice of the supreme court of the State of New York, in the first judicial department, at a special term of said supreme court, to vacate said order of confirmation. That the time for appealing from said

order had not expired. That said motion was duly heard by said justice on or about the 21st day of March, 1871, upon the said proceedings theretofore had in relation to the widening and straightening of Broadway in the city of New York, and such other affidavits and proofs introduced by these defendants and by other persons interested therein which they saw fit to read upon the hearing before said court.

That said motion was brought on to be heard before said court on a notice thereof, stating the time and place when such motion would be made, which was duly served upon all the attorneys and counsel mentioned in said order of confirmation, including the attorney for the plaintiff herein, five days before said hearing, and was published in two newspapers, published in the city of New York, for five days previous to the time mentioned in said notice for making said motion; that
20 all the aforesaid proceedings were taken by the mayor of the city of New York, in the name and on behalf of these defendants.

That upon the hearing of said motion it appeared to said court, and the said court did find and adjudge, that there was error, mistake, and irregularity, and illegal acts in the said proceedings for the widening and straightening of Broadway recited in the declaration herein, and that the assessments for benefit and awards for damage were unfair and unjust, inequitable and oppressive as respects these defendants, and other persons affected thereby; and on the third day of April, 1871, the said court did vacate and annul and set aside said order of confirmation, and refer said matter to three other commissioners of estimate and assessment, and did direct and command said three commissiones to proceed to make a new estimate and assessment, and report the same to the court, as provided in section four of said statute, to the record of which application, finding, and order, and every part thereof filed in the office of the clerk of the supreme court of the State of New York, in the county of New York, defendants pray leave to refer, and hereby make
21 part of this answer as if the same were pleaded and set forth at length herein.

And defendants further say that, by virtue of the said application, finding, and order last above recited, the assessment of loss and damage set forth in folio 32 of the declaration of the plaintiff herein, and the order of confirmation set forth in folio 30, became vacated and annulled, and the same now is null and void and without force or effect.

That prior to and at the time of the passage of the said act of the legislature, the said order of confirmation in the declaration mentioned was, by the statutes of the State of New York, subject to review by the general term of the supreme court on the appeal being taken thereto by said mayor, aldermen, and commonalty, according to the course and practice of said court, and on the hearing of such appeal said general term of said court were empowered to review, modify, or affirm the said order.

That the title to the said premises mentioned in said declaration is not vested in these defendants, and the plaintiff has no right to de-
22 mand or receive the said award, and this the defendants are ready to verify.

Wherefore the defendants pray judgment if the said plaintiff ought to have or maintain the aforesaid action against them.

RICHARD O'GORMAN,
Counsel to the Corporation, and Attorney for Defendant.

And afterwards the plaintiff in due time files and serves his similitur to the first of said pleas, and demurrer to the second of said pleas, which said similitur and demurrer of the plaintiff is in these words, that is to say:

U. S. circuit court for the southern district of New York.

DANIEL GARRISON
against
THE MAYOR, ALDERMEN, AND COMMONALTY
of the city of New York.

And the said plaintiff, as to the plea of the said defendants by
23 them first above pleaded, and whereof they have put themselves upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendants by them secondly above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against them, the said defendants, and that he, the said plaintiff, is not forced by law to answer the same.

And this he, the said plaintiff, is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him &c., &c.

And the said plaintiff, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said second plea, that is to say:

First. That the said act of the legislature of the State of New
24 York, passed on the 27th day of February, 1871, entitled "An act in relation to widening and straightening of Broadway in the city of New York, and to regulate the practice in that proceeding," is repugnant to the constitution of the State of New York and the Constitution of the United States, on the ground that the same impairs the obligation of contract, divests vested rights, and deprives the plaintiff of his rights to said award, contrary to the law of the land and without due process of law.

Second. That the said plea is double, and contains a twofold answer to the said declaration in this, to wit, that the said defendants have thereby pleaded and alleged that by reason of the passage and under the provisions of the said act of February 27th, 1871, and the proceedings by virtue thereof in the said plea alleged, had by the said defendants, the assessment of loss and damage in plaintiff's said declaration alleged, and the order of confirmation therein set forth, became vacated and annulled, and also that by virtue of the statutes of the State of New York, the said order of confirmation was subject to review by the
25 general term of the supreme court on appeal, as therein alleged, and that the title to the said premises in plaintiff's said declaration mentioned was not vested in said defendants.

Third. That it does not appear in and by the said plea that the said defendants, at the time of the filing the plaintiff's said declaration, or at any time since, have taken an appeal to the general term of the supreme court from said order of confirmation of December 18, 1870, according to the provisions of the statutes of the State of New York in said plea mentioned, and according to the course and practice of said court.

Fourth. For that the said defendants have in and by their said plea tendered an immaterial issue, and for that the said plea is in other respects multifarious, defective, uncertain, informal, and insufficient.

JOHN C. SHAW,
Attorney for Plaintiff.

I certify that, in my opinion, the demurrer herein is well founded.
JOHN C. SHAW.

And the defendants file and serve their joinder in said demurrer,
26 which said joinder in demurrer follows in these words, that is to say:

U. S. circuit court for the southern district of New York.

THE MAYOR, ALDERMEN, AND COMMONALTY of the City of New York, *ads.* DANIEL GARRISON.

And the saith defendants saith that their plea by them secondly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof against them, the said defendants; and the said defendants are ready to verify and prove the same when, where, and in such manner as the said court shall direct and award; wherefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto
27 in any manner denied the same, the said defendant prays judgment; and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, the said defendant, &c.

RICHARD O'GORMAN,
Counsel for the Corporation and Att'y for Def'ts.

And because the court of the people, before the aforesaid judge thereof now here, is not advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid of plea aforesaid in this same court, before the justice thereof, until the 1st day of February, 1873, of the term of October, 1872, at the court-rooms, in the city of New York, and southern district of New York.

And the same day is given to the parties aforesaid, at the same place, to hear the judgment of the said court thereupon. At which day, before the judges aforesaid, at the court-rooms of said court, in the city of New York, and southern district of New York, come as well the said plaintiff as the said defendants, by their respective attorneys aforesaid.

28 Whereupon all and singular the premises aforesaid being seen by the said court here, fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said plea, by the said defendant secondly above pleaded, and the matters therein contained, are sufficient in law to bar and preclude the said plaintiff from having and maintaining his aforesaid action thereof against the said defendant.

Therefore it is considered that the said plaintiff take nothing by his said declaration, &c., but that he be in mercy, &c., and that the said defendants do go thereof without day, &c.

And it is further considered by the said court now here that the said defendants do recover against the said plaintiff thirty-nine dollars and cents, for their costs and charges by them about their defence in this behalf laid out and expended, by the said court here adjudged to the said defendants, and with their assent, according to the form of the

statute in such case made and provided, and that the said defendants have execution thereof, &c.

Judgment signed this 28th April, 1873.

R. E. STILWELL,
Deputy Clerk.

29 (Endorsed:) U. S. circuit court. Daniel Garrison ag'st The Mayor, Aldermen, & Commonalty of the City of New York. Judgment roll on demurrer. E. Delafield Smith, corp. counsel & att'y for defendants; A. J. Vanderpool, of counsel. Filed April 28, 1873.

30

31 To the Hon. Lewis B. Woodruff, judge of the circuit court of the United States for the second circuit and southern district of New York:

Compla'ing, sheweth, Daniel Garrison, of the State of New Jersey, that in the record of a judgment rendered in the said circuit court, on the 28th day of April, 1873, in an action wherein he, the said Daniel Garrison, was plaintiff, and The Mayor, Aldermen, and Commonalty of the City of New York were defendants, there is error, in this, to wit, that judgment thereon was entered for the defendants aforesaid, overruling your petitioner's demurrer to the special plea interposed by the defendants, and ordering your petitioner's said action to be dismissed; whereas judgment should have been entered overruling the said plea of the defendants, and affirming the demurrer of your petitioner thereto, because, as your petitioner avers, it was error not to adjudge the act of February 28, 1871, set up in the said plea, as a bar to the action,
32 to be unconstitutional and void, as assigned in your petitioner's demurrer.

Wherefore your petitioner prays that a writ of error be granted to him to remove the record of the said judgment into the Supreme Court of the United States, that justice may be done thereon according to law.

Dated at the city of New York on this third day of May, in the year of our Lord one thousand eight hundred and seventy-three.

DANIEL GARRISON.

Filed May 8th, 1873.

33 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

DANIEL GARRISON
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY of the city of New York.

Know all men by these presents that we, John Scott and Daniel Berrien, are held and firmly bound unto the above-named defendants in the sum of two hundred and fifty dollars, to be paid to the said defendants, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the third day of May, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named Daniel Garrison, has prosecuted and sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York, on 28th day of April, 1873.

Now, therefore, the condition of this obligation is such, that if the above-named Daniel Garrison shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make the same good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN SCOTT. [L. S.]
DANIEL BERRIEN. [L. S.]

Sealed and delivered, and taken and acknowledged, this third day of May, 1873, before me.

R. E. STILWELL,
U. S. Com.

34 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John Scott and Daniel Berrien being duly sworn, each depose and says that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

JOHN SCOTT.
DANI'L BERRIEN.

Sworn to this third day of May, A. D. 1873, before me,
R. E. STILWELL,
U. S. Com.

(Indorsed:) Vol. . Page . U. S. circuit court. Daniel Garrison vs. The Mayor, Alderman, Commonalty of the City of New York. Bond for costs on John C. Shaw, att'y for compl. Filed this 8th day of May, 1873.

Approved as to form and sufficiency of sureties May 8th, 1873.
L. B. WOODRUFF,
Circuit Judge.

35 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the second circuit and southern district of New York, wherein Daniel Garrison is plaintiff in error, and you, The Mayor, Aldermen, and Commonalty of the City of New York, are defendants in error, to shew cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Lewis B. Woodruff, judge of the circuit court of the United States for the southern district of New York, this 8th day of May, in the year of our Lord one thousand eight hundred and seventy-three.

L. B. WOODRUFF,
Cir't Judge.

To the mayor, aldermen, and commonalty of the city of New York.

36 (Indorsed:) U. S. Supreme Court, southern district of New York. Daniel Garrison, plaintiff in error, ag'st The Mayor, Aldermen, & Commonalty of the City of New York, def'ts in error. Citation. John C. Shaw, attorney for pl'ff. Filed May 10, 1873.

Due service of a copy thereof admitted, New York, May 10th, 1873.

E. DELAFIELD SMITH,
Counsel to the Coro'n.

(Indorsement on cover:) No. 438. Daniel Garrison, plaintiff in error, vs. The Mayor, Aldermen, and Commonalty of the City of New York. S. New York C. C. U. S. Filed 10th June, 1873.

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Supreme Court of the U. S.

OCTOBER TERM, 1873.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

DANIEL GARRISON, PLAINTIFF-IN-ERROR,

vs.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

BRIEF FOR THE PLAINTIFF-IN-ERROR.

STATEMENT OF THE CASE.

On the 19th of May, 1869, the Legislature of the State of New York, for the purpose of effecting an improvement of a certain part of Broadway, namely, the part between Thirty-fourth and Fifty-ninth streets, passed an Act, entitled "An Act to alter the map or plan of the City of New York, and to carry the alterations into effect." The *first* section required the Commissioners of the Central Park, within four months after the passage of the act, to lay out and establish

certain new lines of the street, so as to widen and straighten it, and to cause duplicate maps and certificates of the new lines to be filed in certain public offices of the city, which maps were declared to be final and conclusive as to the extent and boundaries of the proposed improvement. The section further declared the new street so laid out, a part of one of the streets of the City of New York, in like manner and with the same effect as if the same had been laid out as a public street on the map of the city made under an Act passed in 1807. And it also provided that "all acts and parts of acts now in force relative to opening, widening, closing, laying out, grading, regulating, sewering, paving and improving streets and avenues in the said city, shall apply to that part of Broadway as so laid out, and to all proceedings under this act, so far as the same are applicable, except as hereinbefore or hereinafter provided."

The *second* section authorized and *required* the Corporation Counsel, *when* the said Commissioners should have filed the maps and certificates, for and in the name of the corporation and for public use, *to acquire title* to the lands required to widen and straighten Broadway in the manner described on the maps and certificates, and for this purpose to apply to the Supreme Court, *at any Special Term thereof* held in the first (city) judicial district, for the appointment of Commissioners of Estimate and Assessment; which Commissioners were authorized and directed, in their report to the Supreme Court, to be made within eight months after their appointment, *to designate the time for the actual opening of that part of Broadway so to be widened and straightened.* The same section further provided, that *immediately* after the expiration of the time so designated, all buildings and parts of buildings on the line of the improvement should be removed, and that the *said street* should be regulated and graded by the proper department of the City government. The awards for damages were required to be made, on certain principles, to the *respective*

owners, lessees, etc., *respectively* entitled unto or interested in the lands to be taken. Provision was made by which any parts of the old street, not required for the new street, might be closed, and by which the abutting proprietors could acquire title thereto, by paying the awards to be made by the Commissioners for the discontinuance of the public easement, *with interest thereon from the day of the confirmation of the Commissioners' report.* The section then directed all awards made to the corporation to be placed by the Chamberlain (City Treasurer) to the credit of the sinking fund of the city, *and all other awards to be paid by him to the parties entitled thereto.* The principles on which the awards were to be made are not material to the present controversy.

The *third* section made the Act take effect immediately.

(*See blue pamphlet, pp.* 5—7.)

At the time of the passage of this special law, there was a standing law in operation, passed April 9, 1813, (*see blue pamphlet, pp.* 10—15) which regulated the proceedings for opening or improving streets in the City of New York, and which it is claimed was applicable to the proceedings under this special Act of May 17, 1869, in the following particulars: 1st, that it made the report of the Commissioners of Estimate and Assessment, when confirmed by the Court, final and conclusive upon all parties. 2d, that it gave the Corporation, on the confirmation of the report, *seizin in fee* of the lands taken, with a right of possession *instanter* without any suit or proceeding for that purpose. 3d, that it gave to each owner of land taken an absolute right to receive payment of the damages awarded to him within four calendar months after the confirmation of the report. 4th, that in case of non-payment by the City within that period, after application, it gave to *each* owner of land taken a right to sue for and recover his damages with interest and costs, in any court of competent jurisdiction, and made the Act itself and the report of the Commissioners, with proof of the right and title of the plaintiff to the sum demanded, *conclu-*

sive evidence in the action. (*See Act of* 1813, §§ 178, 181, *blue pamphlet, pp.* 14—15.)

Proceedings under the special Act of May 17, 1869, and the standing laws therein referred to, were had, by the appointment of Commissioners of Estimate and Assessment, on application of the city as directed by the Act, by a Special Term of the Supreme Court. Their report included, among many other awards, an award of $40.000 to the Plaintiff-in-Error, as his damages for taking a portion of a lease-hold estate which he held on Broadway, and it fixed the time for the actual opening of the new street at the 31st of December, 1870. The report was confirmed by a Special Term of the Supreme Court, by an order of confirmation passed (on motion of the Corporation Counsel) Dec. 28, 1870. No appeal from this order of the Special Term was ever taken by the Corporation, or by the Plaintiff-in-Error.

On the 17th of February, 1871, nearly three months after the confirmation of the report, the Legislature passed an Act, entitled "An Act in relation to the widening and straightening of Broadway in the City of New York, and to regulate the practice in that proceeding." (*See blue pamphlet, pp.* 6–9.) This Act authorized the Corporation to make a *motion* to any Justice of the Supreme Court, either at *Special Term* or *Chambers*, for an order to vacate the order of confirmation previously made by the Special Term; and it authorized the said Court or Justice to whom the motion might be made, to vacate the order of confirmation, and to declare it null and void, if it should appear to the said Court or Justice, on the prescribed proofs, that there was any error, mistake, irregularity, or illegal act in the said proceedings for the widening and straightening of Broadway, at any stage thereof, or if it should appear that the assessments for benefit, or the awards for damages, *or any or either of them*, have been unfair, or unjust, or inequitable, or oppressive, as respects the Corporation, or any person or persons thereby affected, and to refer the matter back to other Commissioners for a new assessment in whole or in part, as the

Court or Justice might direct.

Under this last mentioned Act, a motion was made by the Corporation to Judge Cardozo, *then* a Judge of the Supreme Court, at a Special Term, for an order to set aside the order of confirmation passed Dec. 28, 1870; and after the notice prescribed by the Act of 1871 and a hearing, the said Justice, at a Special Term, on the 3d of April, 1871, passed an order, vacating and annulling the order of confirmation in all respects, and referring the matter to new Commissioners for an entirely new report.

The Plaintiff-in-Error, being a citizen of New Jersey, on the 21st of July, 1871, brought an action against the city to recover his award of $40,000, in the Circuit Court of the United States for the Southern District of New York, and filed his declaration August 3d, 1871. His declaration alleged that the Plaintiff was the owner of a lease-hold estate on Broadway, at its intersection with 47th Street and 7th Avenue; that under the Act of May 17, 1869, the proceedings authorized and required by it and by the laws therein referred to were had, and that by the report of the Commissioners appointed for the purpose, duly confirmed by the Supreme Court of the State on the 28th of December, 1870, the sum of $40.000 was awarded to the Plaintiff as damages for the taking of a portion of his estate for the purpose of widening and straightening Broadway; that by force of the said Act and of the laws therein referred to, these proceedings were final and conclusive upon the Corporation, and vested in the Corporation in fee, the title to the premises taken, and in the Plaintiff the right to the payment of the sum awarded within four calendar months after the date of its confirmation; that although more than four calendar months have elapsed, the Corporation, although requested, has neglected and refused to pay the award; *wherefore*, the Plaintiff brings this action and demands judgment for the sum of $40.000 and interest.

The Defendant pleaded first the general issue, with a conclusion to the country, and on this plea issue was joined.

The Defendant also pleaded specially, under the usual leave. In the special plea the Defendant alleged as a bar to the action, that on the 27th of February, 1871, and before the expiration of four calendar months from the date of the confirmation of the said award, the legislature passed an Act entitled "An Act in relation to the widening and straightening of Broadway, in the City of New York, and to regulate the practice in that proceeding;" that by the 4th section of this Act it was provided that within four months from the date of the order of confirmation of the awards, the Defendant might at its option move before a Justice of the Supreme Court, either at Chambers or Special Term, to vacate the order of confirmation, on the showing of error, mistake, irregularity, or illegal act in the proceedings for widening and straightening Broadway, or if it should appear to the Court or Justice that the awards for damage, or either of them, had been unfair or unjust, or inequitable or oppressive as respects the Defendant, or any person affected thereby, and that thereupon the order of confirmation might be vacated and should become null and void, and the matter should be referred to new Commissioners for a new assessment and award, within six months after the new reference; the new report to be presented and acted upon after a certain notice and by a certain course, prescribed in the Act last mentioned and set out in the plea. The plea further averred that by section 6 of the Act of February 27, 1871, the proceedings and proofs on the motion for vacating the former awards were prescribed; that such proceedings have been had, in due compliance with the requirements and regulations of the said last mentioned Act, by a motion made by Defendant to and before a Judge of the Supreme Court at Special Term, on or about the 21st day of March, 1871, and that on the 3d of April, 1871, the original order of confirmation was by the said Court vacated, annulled and set aside, and a new reference was made to other Commissioners, &c. *Wherefore*, the plea concluded, the title to the premises is not vested in the Defendant, and the right to demand or

receive the amount of the award declared upon, is not vested in the Plaintiff.

To this plea, as a bar to the action, the Plaintiff demurred, on the ground that the Act of February 27, 1871, is unconstitutional and void, because repugnant *both* to the Constitution of the United States in that it impairs the obligation of a contract, and to the Constitution of the State in that it undertakes to divest vested rights, contrary to the law of the land, and without due process of law. There was a joinder in demurrer by the Defendant.

The cause was set down for argument on the demurrer to the special plea, and after argument, the Circuit Court (Shipman, J., who heard the cause) overruled the demurrer, sustained the plea as a bar to the action, and gave judgment for the Defendant. No opinion was filed or written by the Judge in the Court below. The record was then brought to this Court by writ of error.

ASSIGNMENT OF ERRORS.

1. Because the Court below erred in not sustaining the demurrer upon the ground that the Act of February 27, 1871, impaired the obligation of a contract between the City Corporation and the Plaintiff-in-error, against the prohibition of Art. 1, Section 10 of the Constitution of the United States.

2. Because the Court below erred in not sustaining the demurrer upon the ground that the Act of February 27, 1871, violated the Constitution of the State of New York, Art. 1, Section 1, Section 6, in that it divested a vested right contrary to the law of the land, and took away property without due process of law.

I.

UNDER THE FIRST ASSIGNMENT OF ERRORS.

The first question to be considered is, whether, in consequence of a complete execution of the special law of May 17, 1869, and the standing laws therein referred to, a contract had arisen between the City Corporation and the Plaintiff-in-Error, before the law of February 27, 1871, was passed.

1. Contracts, as arising out of legislation or public grant, within the meaning of the clause in the Constitution of the United States which protects the obligation of contracts, are of two classes One class is where the State itself enters into a contract with a natural or artificial person; the other class is where a contract between natural or artificial persons results from the execution or operation of a law. The present case is of the latter description, and it may be useful to refer to some of the adjudged cases, where a contract between third persons has been held to have resulted or arisen directly from the execution and operation of a legislative Act, under which there became two parties, each of whom acquires something from the other, by a mutual obligation created by the direct operation of the law. Thus in *Curran v. The State of Arkansas*, 15 Howard, 304, it was held that where the charter of a banking corporation set apart a fund as capital out of which debts were to be paid, a contract arose with those who became creditors on the faith of it, that the fund should not be withdrawn and appropriated to the use of the owner or owners of the capital stock. There the contract was held to have arisen between the creditors and the banking corporation, notwithstanding the State which granted the charter was the sole owner of its capital stock. So also, where the Legislature of a State authorized Commissioners to borrow money to be used in making a canal, and for the redemption of the loan pledged the canal itself, its tolls, rents and lands, it was held that a contract arose between the lenders of the

money and the Canal Corporation that the property pledged should be applied to the payment of the bonds.

Trustees of Wabash Canal v. Beers, 2 Black, 448.

So where the charter of a Rail Road corporation made the stockholders liable to the extent of their stock for the debts of the Corporation, it was held that there had arisen a contract between the creditors of the corporation and the stockholders, to pay the debts of the corporation out of the private property of the stockholders to the amount of their respective interests in the stock.

Hawthorne v. Calef, 2 Wallace, 10.

And where a statute had authorized a municipal corporation to issue bonds and to exercise the power of local taxation to pay them, it was held that the power of taxation thus given was a contract between the corporation and the bondholders; that the power became a trust, which the donee was bound to execute.

Von Hoffman v. The City of Quincy, 4 Wallace, 535.

In all such cases, there is a contract of complete mutuality, because one party has, by the operation and execution of an authority given by law, parted with something to the other party, and that other party has become bound to perform a corresponding obligation.

Nor has it ever been doubted that in the execution of laws by which private property is taken for public improvements, or municipal corporations are authorized to pledge their credit for such improvements, a contract may have arisen. The question always is, in such cases, not whether there can be a contract between the parties, resulting from such legislation, but whether the law has been so executed that a complete contract has arisen. The cases where it has been held that the supposed contract was incomplete when subsequent legislation undertook to alter or annul the conditions

of the bargain or transfer, and therefore that no contract existed, strongly illustrate the principles which determine when a contract does exist. Thus, where a County was authorized to subscribe to the stock of a Rail Road Corporation, on condition that a majority of the tax-payers should so vote, and a majority had so voted, but no actual subscription had been made until after the Constitution of the State prohibited such subscriptions, although the bonds were in fact issued and delivered to the Railroad Corporation, it was held that no complete contract had arisen. But it was not doubted in this case, that if the subscription had been made and the bonds delivered *before* the constitutional prohibition, there would have been a complete contract.

Aspinwall *v.* The Commissioners of Daviess County. 22 Howard, 364.

In like manner, where the charter of a Rail Road Corporation enabled them to have land condemned to their use on payment or tender of the value found by an inquisition, and after such an inquisition had been held, but before the Corporation had accepted it and paid or tendered the money, the Legislature passed a law requiring the court to set aside the inquisition, it was held that there was no complete contract. This decision was made upon the express ground that the payment or tender of the value assessed by the inquisition was requisite, by the terms of the charter, to give the Corporation a title ; and as the Corporation had acquired no title, by the proceedings, there was no mutuality, and hence no contract, when the Legislature set aside the inquisition, and awarded a new trial.

Baltimore and Susquehanna Rail Road *vs.* Nesbit. 10 Howard, 395.

Yet, if, by the terms of the charter, the land had become vested in the Rail Road Company by the mere force of the inquisition, and a right of action for the sum found

had vested in the owner of the land, it would have been impossible for this Court to deny that a complete contract had arisen; and the doctrine that a new trial may be awarded by a subsequent act of the Legislature would have had no application to the case.

When we turn from the negative to the positive cases, we shall find that the inquiry always is, whether under the execution or application of an existing law, a complete valid contract, with mutuality between two parties, had arisen and remained for execution, when subsequent legislation undertook to affect it. Thus, in the case of *The Home of the Friendless vs. Rouse*, where the Legislature, in a charter establishing a charitable institution, exempted its property from taxation and from the standing laws which made all charters repealable or alterable, it was held that *after the corporation had been organized*, the charter was a perpetual contract that the institution should be exempted from taxation. The same principle was applied to an incorporated institution of learning.

Home of the Friendless *v.* Rouse. 8 Wallace, 430.
Washington University *v.* Rouse, *Ibid*, 439.

So also it has been held that a contract for the sale of a slave, valid and binding by the law of the place where and at the time when it was made, is valid and may be enforced notwithstanding a subsequent constitutional provision which prohibits the courts from taking cognisance of debts the consideration of which is a slave or the hire of a slave.

White *v.* Hart. 13 Wallace, 646

2. An examination of the laws under which the award of the Commissioners was made to the Plaintiff-in-error, and according to which their report was confirmed by the Su-

preme Court, will show that on that confirmation, the title to the premises became, *ipso facto* and immediately, vested in the Defendant-in-error, and a right to demand, sue for and recover the amount awarded as his damages, at the end of four calendar months, at once and *ipso facto* vested in the Plaintiff-in-error. This constituted a contract, with complete mutuality, valid and binding, before the Legislature undertook to interfere by the Act of Feb. 27, 1871.

By the Act of April 9, 1813, the report of the Commissioners, when confirmed by the Court, is made final and conclusive upon all parties ; the Corporation becomes *seized in fee* of the lands taken, with a right of possession *instanter* without any suit or proceeding for that purpose ; and the owner of the land taken is in each instance absolutely entitled to receive the damages awarded, within four calendar months after the confirmation of the report, and in case of non-payment, after application, he may sue for and recover the same with interests and costs, in any court of competent jurisdiction.

It is perfectly clear, that it was the intent of this Act, so to execute the constitutional provision which requires compensation to be made for property taken for public use, as to fix a definite point of time at which, on the one hand, the public should become vested with the title and use, and the owner of the land, on the other hand, should have a fixed and vested right to his damages.

This is a feature essential to every system by which the power of eminent domain is to be exercised. As the land is not to be acquired by a voluntary conveyance, as it is to be taken *in invitum*, and as the title of the Corporation, whether it be a public or private Corporation, can be evidenced only by the recorded proceeding by which the title is acquired, it is essential that a precise time be fixed when that title is to be deemed to have changed. That time was fixed by the

Act of 1813 at the confirmation of the report; and the reasons of public policy and necessity for this provision are fully stated in the opinion of the Court of Appeals in *The Matter of the Commissioners of Central Park*, 50 New York, 493.

The present case, therefore, differs from the case of *The Baltimore, &c., Railroad vs. Nesbit* in this; that in that case, the point of time at which the title was to vest in the Corporation and the right to the damages was to vest in the owner of the land, was not the assessment of the damages, but the acceptance by the Corporation of the proceedings under the inquisition, and payment or tender of the damages; whereas, in the present case, the point of time at which the title vested in the Corporation and the right to the damages vested in the party whose land was taken, was the confirmation by the Court of the report of the Commissioners. In the one case, there was no mutuality, and hence no contract, when the Legislature authorized the inquisition to be set aside and a new trial to be granted; in the present case, there was a complete mutuality of contract, when the Legislature interfered to annul the proceeding and to direct a new assessment of damages already found, confirmed, and recorded. The fact that the act of Feb. 27, 1871, was passed before the expiration of the four months from the confirmation of the report, does not affect the contract. On the confirmation of the report upon the 28th of December, 1870, the right of the Plaintiff-in-error to the sum awarded to him as damages became a fixed and vested right to bring an action for its recovery at the end of four months from that time; and any enlargement of that time, any postponement of the period fixed by the contract for the payment for his land, any imposition of new conditions not expressed in the contract, for whatever reason such deviation from its terms is adopted, impairs its obligations.

Green *v.* Biddle. 8 Wheaton, 84.
Von Hoffman *v.* Quincy. 4 Wallace, 535.

II.

We now proceed to show wherein the obligation of this contract has been impaired.

1. It is apparent from the nature of this proceeding under the special Act of May 17, 1869, and the laws therein referred to, that although the lands of several owners are taken and their several damages are assessed in one proceeding, yet there results necessarily a several contract with each distinct owner of a distinct parcel, when the report of the Commissioners is confirmed. A Rail Road Corporation might be authorized to run its lines through many different tracts of land, and to acquire the title to each and to have the damages assessed for each, in one proceeding and at the same time; but the contract to pay would be with each separate owner in respect of his separate parcel, and that contract would arise on the instant at which the statute fixed the change of title. So under this Act of May 17, 1869, and the laws therein referred to, it is perfectly apparent that on the confirmation of the report, the award of damages made to each separate owner whose land is taken, becomes his separate property, and is the substitute to which he is constitutionally entitled in place of the land which he is compelled to surrender *in invitum*. Any new legislation therefore, occurring after his right to his several award has become vested, which undertakes to annul *his* award, upon the suggestion or proof of fraud, irregularity, mistake, or over-valuation, in any of the other awards, affects a contract that was made with him separately, for reasons that do not relate to his case at all.

2. As soon as the report of the Commissioners was confirmed, namely, on the 28th of December, 1870, the plaintiff-in-error not only had a vested right to receive the sum of $40,000 as his damages, but he had a fixed and vested right to a remedy expressly given by the Act of 1813, namely, a right to bring an action on that award if it was not paid within

four months from the time of its confirmation. The validity of his award, as affected by fraud or irregularity of any kind, could not be tried by a new Commission of Assessment after the award of the first Commissioners had been confirmed by the Court. He had a vested right to a *particular* remedy, not merely a right to *some* remedy. His vested right to a particular remedy was the right to bring an action on his award, in which action the statute made the confirmation of the report conclusive evidence that the money was due to him. *This remedy was an essential part of the contract; made so by express statute provision.*

3. The Act of Feb. 27, 1871, annulled the contract entirely, by providing that the order of confirmation, including the Plaintiff-in-error's award, might be set aside *on motion* showing any error, mistake or irregularity, or illegal act in the proceeding for widening and straightening Broadway, or if it should appear to the Court or Justice that the awards for damage, *or either of them*, had been unfair, unjust, or inequitable, or oppressive, as respects the Defendant (the City) or any person affected thereby; and that thereupon the order of confirmation might be vacated and should become null and void. That is to say, after the award made to the Plaintiff-in-error had been confirmed by the Court, it is claimed that it might be set aside for reasons affecting *any* of the awards, although it be not shown that *his* award was not perfectly just and equitable. Now this could not be done without impairing the obligation of a contract with the Plaintiff-in-error. The only mode in which the City could be allowed to avail itself of any error, irregularity or want of equity, in any of the awards, was to have the report of the Commissioners recommitted, before it was confirmed. The contract to pay the Plaintiff-in-error $40,000, which had become fixed by the confirmation of the first Commissioners' report, could not be set aside by any summary proceeding whatever. The law which made the award a fixed contract when the report of the Commissioners had been

confirmed, made ample provision for the correction of any error, irregularity or fraud, *before* the report of the Commissioners had been confirmed. It authorized the report to be recommitted to the same or to new Commissioners, *toties quoties, until it had been confirmed.* But *when* confirmed, the contract was fixed, complete and mutual; and no newly created proceeding could set aside or annul it, without destroying its obligation. Even if the order of confirmation could be set aside, on an appeal, by the General term, there is an entire want of analogy between such an appeal and a newly authorized motion to annul the order; for pending the appeal, the obligation of the contract would be undisturbed, and if the General Term found no error or excess in the Plaintiff-in-error's award, it would be confirmed to him, whereas the motion authorized by the Act of Feb. 27, 1871, annulled the contract with the Plaintiff-in-error for reasons that did not touch the merits of *his* award at all.

4. The Act of Feb. 27, 1871, took away a vested right to a particular remedy on the award of $40,000, and gave no substitute remedy by which the Plaintiff-in-error could recover *on that award.* The last mentioned Act authorized the Court to vacate the order of confirmation; and the *motion* for this purpose operated, in express terms of the law, as a stay of all actions brought or to be brought for the enforcement or collection of the awards made by the Commissioners whose report had been confirmed. When the motion had resulted in the annullment of the awards and they were set aside, and the right of action on them was indefinitely stayed, the remedy, which was expressly made a part of the contract, was gone. The creditor was left "in a condition in which his rights live but in grace, and his remedies in entreaty only."

Curran *v.* The State of Arkansas, 15 Howard, 304, and the cases there cited.

It is no answer to this to say that when a new award had been confirmed, the Plaintiff-in-error would have his right of action on *that new award.* His contract gave him a right of action on the award for $40,000, which was confirmed Dec. 28, 1870; and this right of action, which accrued on that day, could be put in force on the expiration of four months from that time. Before this period had expired, this right of action was annulled, if the law of Feb. 27, 1871, is valid. The remedy, therefore, on his award of $40,000, was gone; and this remedy was an essential part of the contract. If it was competent to the Legislature thus to destroy his first contract, it could go on indefinitely, after every successive new award of damages, set it aside, and order a new commission. There could be no time when any order of confirmation would become "final and conclusive" upon the rights of the parties.

III.

This proceeding has been defended in the Court below upon grounds which will probably be taken here, and which we proceed to examine.

1. It is said that the demurrer admits that at the time of the passage of the Act of Feb. 27, 1871, the order of confirmation was appealable from the Special to the General Term of the Supreme Court. We do not so understand the effect of the demurrer. The plea does not assert as a fact that any appeal had been entered, but only that the order was *appealable.**

This is matter of law, therefore; and if it be not true as a matter of law, that the order of confirmation was appealable, the demurrer does not admit that it was, because a demurrer admits only what is well pleaded.

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* No appeal was ever in fact taken from the Special to the General Term.

2. It is said that as matter of law the plea is true; that the order of confirmation was appealable from the Special to the General Term, and that all the Legislature has done is to substitute a revision by *motion* for a revision by *appeal*. On this question, of a right of appeal from the order of confirmation, we are at issue.

It is important to discriminate here, as to what is meant by a right of appeal, *as applied to the City*, under this proceeding. A municipal corporation is authorized by a special law to exercise the right of eminent domain, by acquiring land for widening one of its streets through a prescribed proceeding. What it has to do, and is authorized to do, is to get a title to the land, or to *acquire* it. What it is obliged to do, is to pay the damages awarded. It promotes, as actor, the proper proceeding to get the land, and acquires it by order of the Court. It has gotten all that it could get. In that part of the proceeding in which it is strictly an actor, compelling a transfer of title *in invitum*, it is completely successful, and any appeal by *it* is an appeal by a party who has obtained what he sought. Now how does an appeal by such a party operate? Does it suspend the transfer of title, or place it *in nubibus*? Does it postpone the time when the City is to be regarded as having acquired the title? A cursory inspection even of the Act of 1813 will show that this cannot be, for the Act expressly declares that the City shall be seized in fee of the premises, on the confirmation of the report; and the reasons of public policy on which this provision is based, are too obvious to require enlarged discussion. Somebody must be responsible to third persons for what may take place upon the land. This can not be the former owner, for the law has divested him of the title on the confirmation of the report. Great public reasons of convenience and necessity also require that the City should have the right to possession and use of the land; and for these reasons the law has so fixed the transfer, that there can be no period when the title can be in a state of suspense.

These considerations show that to speak of an appeal *by the City*, which is to have the effect of vacating or suspending that part of the order of confirmation which operates as a transfer of title, is to speak of that which cannot exist. It supposes that a party who has acquired by a statute proceeding the very thing which he sought, can divest himself of that thing by an appeal from the decree which gave it to him, and that by such appeal he postpones the acquisition.

But it is said, that the right of appeal for the City was a right to have a revision by the General Term of the assessments for benefit and the awards of damages.

But it is to be observed that no such appeal was given by the law of 1813, or any of its amendments, to either party. On the contrary, the rights of all parties were fixed on the confirmation of the report, and the remedy provided against error, excess, inequality or want of equity, was by a recommitment of the report, before it had been confirmed. This shows, that in principle and as an original question, no right of appeal, from an order of confirmation, existed for any party to the proceeding.

We will now show that according to the practice and the decisions of the local Courts, this supposed right of appeal by the City is not to be considered as existing, when the Act of February 27, 1871 was passed. We are not sure that even if the State Courts had so construed the Act of 1813 as to admit of a right of appeal from the order of the Special Term to the General Term, this Court would be bound to follow them; for, although it would be a construction of a State Statute by the Courts of the State, it must be remembered that this question of appeal is involved in the determination of what were the terms of a contract; and when the terms of a contract are to be found, this Court will judge of the contract for itself. If the contract, rightly interpreted, excludes the right of appeal from its terms,

this Court is not bound to follow a construction of the State laws on which the contract arises, if it thinks that construction erroneous.

See the rule of decision, stated in Jefferson Branch Bank *v.* Skelley, 1 Black, 436.

But we do not mean to be understood as admitting that the State Courts have finally and authoritively construed the law as giving or allowing a right of appeal from the Special to the General Term. The latest decision of the Court of Appeals on the meaning and operation of the Act of 1813, shows that all the previous *dicta* on the subject of an appeal to the General Term from an order of confirmation made at Special Term, must now be considered as incorrect.

See The Matter of Commissioners of Central Park. 50 New York, 493.

The conclusive reasons assigned by the Court in this case, for not allowing an appeal to the Court of Appeals, apply with equal force to an appeal from the Special to the General Term of the Supreme Court. But we think it best to review here the previous cases.

There is but one case in the books, where the *Corporation* has appealed from the Special to the General Term in one of these proceedings under the Act of 1813. This case is *The matter of widening Wall Street*, (17 Barbour, 617). It was not an appeal from an order of the Special Term confirming a report of Commissioners, but it was an appeal from an order refusing to confirm, which refusal was put upon the ground that the report was erroneous in not allowing for damages to the building, as well as damages for the land. It was contended for the owner that the order of refusal to confirm was not appealable. This point was not directly decided by the General Term; but as they entertained the appeal and confirmed the order of refusal below, it may be considered that they regarded this particular order

as an appealable one. But this is a very different question from the alleged right of the City to appeal from an order of confirmation made and entered on its own motion. The Act of 1813 does not make an order denying a motion to confirm "final and conclusive;" but it does make "final and conclusive" an order of confirmation when made and entered. The Wall Street case is therefore no authority for an appeal from an order of confirmation. It was decided in 1854, before the passage of the Act of 1854 mentioned *infra*.

Next in order of time is the case *Matter of Canal and Walker Streets*. (12 New York, 406, decided in 1855.) The order of the Special Term confirming the report of Commissioners was made December 3, 1853. Certain private parties appealed to the General Term, under the provisions of a General Act passed in 1854, the first section of which provided for an appeal to the General Term of the Supreme Court "from any judgment, order or final determination made at *the Special Term* of said Court in any *special proceeding therein*." The General Term affirmed the order of confirmation, and an appeal was then taken to the Court of Appeals. The City and certain other parties moved to dismiss this appeal, on the ground that the order of the General Term was not appealable. The question before the Court of Appeals related solely to the right of appeal to the Court of Appeals. This was denied by the Court of Appeals, on the ground that the Act of 1813 gave final jurisdiction to the Supreme Court in these street cases. In giving the judgment of the Court, Gardner Ch. J, expressed the opinion *obiter*, that under the Act of 1854 an appeal lay from the Special to the General Term of the Supreme Court. But not only was this an uncalled for *dictum*, but subsequent decisions show that it was entirely erroneous, because they show that the Act of 1854 is inapplicable to these proceedings, even where they are conducted solely under the Act of 1813.

Thus, in *The Bowery Extension Case*, (2 Abbot's Practice

Reports, 368. 1855), the Supreme Court (General Term) held that the Act of 1854, giving appeals to the General Term in *special proceedings*, was inapplicable to a confirmation made at Special Term in one of these street proceedings. They so held, in conformity with the decision of the Court of Appeals, (Canal and Walker Streets), which had decided that the same phraseology, in the *Code*, in reference to appeals to the Court of Appeals in special proceedings, was not applicable to proceedings for effecting street openings. The language of the Code is,

> "The Court of Appeals shall have exclusive jurisdiction to review upon appeal every actual determination hereinafter made at a General Term of the Supreme Court * * * * in a final order affecting a substantial right made in a special proceeding." * * Code, Sec. II, Sub. 3.

Next we have the case of *Pryor's Appeal*, (5 Abbot's Pr. R., 272, 1857), in which a majority of the Supreme Court, General Term, entertained an appeal, influenced obviously by the *dictum* in the case of Canal and Walker Streets. But they said that the case had been differently decided in their district; and the view that they took of the conclusiveness of the confirmation was that the provisions of the Act of 1813, on this head, receive their full meaning when applied to a report that has been confirmed by the Supreme Court, without appeal, or by the Supreme Court on appeal, *when the law in general terms allows such appeal.* PEABODY, J., who sate in the Bowery Case, again held, in this case of Pryor, that no appeal lay. The case does not overrule the Bowery Case.

> See the syllabus, where the point is put under a *semble.*

Subsequently (1861) in *The Matter of Seventy-Sixth*

Street, (12 Abbot's Pr. R., 317), INGRAHAM, J., held that no appeal lay from an order of confirmation made at Special Term, and said that the Bowery Case must be regarded as conclusive on this question until it had been reversed by the General Term. Then in the case *In Re Sixty-Fifth Street*, 23 Howard's Pr. R., 256, (decided at General Term 1862), the Supreme Court expressly affirmed that the law as held in the Bowery Case was to be followed; and they further said that on the confirmation, the title to the land taken vests in the Corporation under the Act of 1813.

Thus the law stood, showing that the *dictum* in the case of Canal and Walker Streets was not correct, in the view of the Supreme Court, when the case of *King v. The Mayor*, &c., (36 New York, 182), came before the Court of Appeals. In this case, the sole question before the Court of Appeals was whether a *writ of error* was the proper remedy by which to obtain a reversal of an order of the Supreme Court, General Term, which had dismissed an appeal from the Special Term after an order of confirmation. The Court of Appeals held that the writ of error was *not* the proper remedy. But in delivering the judgment of the Court to this effect, DAVIES, Ch. J., went so far out of his way, as to express, quite *obiter*, the opinion that it was the duty of the General Term to have heard the appeal from the order of confirmation and not to have dismissd it. He said that it was *a special proceeding under the Code*, and as such appealable.

Now these *dicta* are entirely inconsistent with the whole reasoning of the Court of Appeals in the more recent case of *The Matter of Central Park*, (50 New York, 493). In this case it was held that the general statute regulating appeals to the Court of Appeals did not repeal or affect the provisions of the Act of 1813 respecting the finality and conclusiveness of an order of confirmation made by the Supreme Court in one of these street proceedings. The reason assigned by the Court for this decision was that these are not

special proceedings within the meaning of the general statute regulating appeals, but they are proceedings in a special jurisdiction designed in its very nature and object to be final; and as the terms of the Code regulating appeals to the Court of Appeals are identical with those of the Act of 1854 regulating appeals from the Special to the General Term of the Supreme Court, this case has settled the question we are now considering. Nothing can be more forcible or applicable than the reasoning of ALLEN, J., in this case, on the conclusive character of an order of confirmation, when made; and we therefore say that all previous *dicta* and doubts respecting the appealable character of such an order are overruled by this decision.

The fact that the Act of February 27, 1871, passed three months after the confirmation of the Commissioner's Report, and when no appeal from that confirmation had been taken, undertook *ex industria* to provide for an appeal from the Special to the General Term, in this particular proceeding, affords very strong proof that no right of appeal previously existed, which was applicable to this proceeding.

If, as is now claimed, this order of confirmation was appealable under the Act of 1854, or under any other law, before the Act of February 27, 1871, was passed, the latter was so far a mere work of supererogation. It cannot be regarded as declaratory of a previously existing right of appeal. It is a new creation of such a right, and it is therefore the strongest of all evidence that the right did not previously exist. In the *Mayor, &c., v. Erben*, 49 New York, 499, Mr. Justice Hunt laid down the law as to the conclusiveness of the damages found in these terms: "It is intrusted by law to the Commissioners solely, subject to an appeal to the *Special Term* of the Supreme Court, and no other Judge, Jury, Court or referee has the slightest authority to examine into the matter."

Even if we should concede that a naked *right* of appeal existed for the City, when the Act of February 27, 1871, was passed, (no appeal having been actually taken,) the question still remains whether the order of confirmation, made by the Special Term December 28, 1870, was not "final and conclusive" upon the rights of all parties, when that Act was passed. This depends, in one aspect of the case, upon the construction and operation of the special Act of May 17, 1869, taken in connection with the Acts of 1813 and 1839. All these are local Acts, *in pari materia*, and they are to be construed together. The Act of 1813 was passed and was long in operation, before the present organisation of the Supreme Court. It directed the report of the Commissioners to be made to "the Supreme Court of Judicature of this State:" and directed the Court to hear it and confirm it, or to recommit it, *toties quoties*, until a report had been made "which the said Court shall confirm," and when so *confirmed* it was to be "final and conclusive" upon all parties. The context shows in what sense and for what purposes it was to be final and conclusive; namely, it was to change the title from the former owner to the corporation, and to vest in the former owner the right to the damages awarded to him, with a right of action to collect them, which right of action was to begin to run at the end of four months from the date of confirmation, ***but was vested as a right by the confirmation.*** The Act of 1813, which in general terms directed the report to be made and confirmed by the Supreme Court of Judicature, did not specify at what term of the Court the proceedings were to be had. But in 1839 a law was passed to regulate the practice. Its first section directed the application for the confirmation of the report to be made to "the Supreme Court at the term thereof held in the city of New York, or at such *special* term as the Supreme Court may appoint for that purpose." (See blue pamphlet, p. 17.)

This direction meant that while the application for

the appointment of Commissioners might be made to the Supreme Court sitting in Albany, during certain months in the year, yet the report of the Commissioners must be made to and confirmed by the Supreme Court in the City of New York, at its regular term, *or* at such special term as the Court itself might appoint for the purpose. Thus the law stood down to 1847, when the present organisation of the Supreme Court, for separate judicial departments, or districts, was made, with General and Special Terms; the General Term being the Court *in banco*, for the hearing of such appeals as are allowed by law, the Special Term being a Court held by a single judge for the purpose of original, and in some cases, of final jurisdiction.

Construing the Acts of 1813 and 1839, therefore, in connection with the special Act of May 17, 1869, we find that the latter Act, in its 2d section, provides that the city shall acquire title to the lands needed to straighten and widen this particular street, Broadway, at the place designated, by applying to *any Special Term of the Supreme Court* for the appointment of Commissioners, and that their report is to be made to "the Supreme Court." This could mean only *the Supreme Court Special Term*, for no other Court, or form of the Court is spoken of in the Special Act. Moreover, the Special Act was so construed and executed. The report was made to and confirmed by the Special Term. Applying to this state of things the provisions of the Act of 1813, it is clear that whether a naked *right* of appeal from the Special to the General Term existed for either party, the confirmation of the report by the Special Term would be "final and conclusive," as to the vesting of the title and the vesting of the right to be paid the award, if no appeal was in fact taken; and none is averred in the plea. The mere *right* of appeal, never exercised, could not keep the title in abeyance, or prevent the right of action on the award from vesting. The Act of 1813, as every act must, by which such proceedings are to effect a change of title, fixes a definite point of

time at which the title is to vest in the city. That time is when the Court which is to confirm the report, has confirmed it. If an appeal lay, and was actually taken, a question might have arisen as to how much of the order of confirmation was suspended during the appeal, which it is not necessary to consider here, because no appeal is averred to have been taken. It. may be observed, however, that an actual appeal *by the city* could not divest that part of the order of confirmation which *takes* the land, even if it opened for revision the amount of the awards. Our position then is, that no appeal having been taken by the city, when the Act of Feb. 27, 1871, was passed, the confirmation by the Special Term on the 28th December, 1870, was "final and conclusive," by force of the Act of 1813.*

*The manner in which the Ordinances of the City, have always carried into execution the Act of 1813 and its supplements, in making street improvements, shows the conclusive effect of an order of confirmation when made by the Court upon a report of commissioners of estimate and assessment. The standing Ordinances provide the following machinery for this purpose: 1. There is a "Bureau of Collection of Assessments," organized in the Street Department; and this Bureau is "charged with the duty of collecting all assessments which are confirmed according to law." 2. The assessment list is to be delivered to the Street Commissioner, who is the head of the Street Department, and who is required to charge the amount thereof on the books of his office to the account of the Collector of Assessments, and then to transmit the list to the Collector for collection. 3. On receiving the list, the Collector is required to make an entry in his books of the title and amount of the assessment, *the date of its confirmation* and the date of such entry. 4. The Collector is then required to deliver the assessment list to one of his Deputy Collectors, whose duty it is made to notify the parties of the title of the assessment, *the date of its confirmation*, the place, amount, &c. 5. Assessments remaining unpaid for sixty days after the entry thereof in the records of titles of assessments confirmed, may be collected by warrant. 6. Interest runs on an unpaid assessment after the aforesaid period of sixty days. This elaborate system, designed to secure the collection of the funds by which the City is to reimburse itself for the awards of damages which are payable in four months from the date of confirmation, is based upon the assumption that the assessments as well as the awards of damages become fixed legal facts on the date of confirmation of the report; that both assessments and damages are conclusively found on that day; and that immediate steps must then commence and be continued in the order and detail above mentioned,

to effectuate the full execution of the order of confirmation. As soon as the order of confirmation in this case was made by the Court on the 28th of December, 1870, the standing ordinances of the City attached to it, for its execution according to law; and as the presumption is that the public officers did their duties respectively, the City ordinances for the collection of assessments were in operation upon this list of assessments for nearly three months before the Legislature interfered to annul the whole proceeding. (See Hoffman's Digest of Charters, Statutes and Ordinances of and relating to the City of New York, &c. Vol. I, pp 235-236.)

What may have been the legal effect of the law of Feb. 27, 1871 on the *assessments* imposed by the order of confirmation passed by the Court Dec. 28, 1870, is not a subject of inquiry in the present case. The presumable fact that those assessments had been extended on the proper books, according to law, before the passage of the law of Feb. 27, 1871, is adduced here as confirmatory proof that the Act of 1813 has always been regarded as capable of execution in one way only; namely, that the damages awarded become conclusively fixed on the confirmation by the Court of the commissioners' report. Even assuming that the Legislature can, after a confirmation, interfere and absolve from payment the parties whose property was assessed, it does not at all follow that it could absolve the City from its contract to pay the damages to an owner whose land was taken and whose title was vested in the City by the confirmation. The assessments are merely provided as means by which the City is to reimburse itself for what it contracts to pay as damages, (Act of 1813, Sec. 185.) If the Legislature takes away that fund, and does not provide another, the obligation of the contract with the owner whose land has been taken remains just where it was originally. Indeed, if the Legislature takes away that fund and provides no other, it may be said that the obligation of the contract with the owner whose land is taken is *a fortiori* impaired. The matter may be stated thus: A is awarded $1000 damages for taking his land. The City is authorized to collect assessments amounting to $1000 in certain sums from B,C , D, and E, to reimburse itself for what it has contracted to pay A. The Legislature releases B, C, D, and E from payment of their assessments, and provides no other fund from which the City can reimburse itself for the amount due to A. Does this operate at all upon the contract to pay A $1000? If it operates upon that contract at all, it impairs its obligation. (See Von Hoffman *v.* Quincy, *ut supra*). If the Legislature orders a new assessment *on another basis of damages*, it would not be a provision of another fund out of which to pay A's award of $1000, but it would be a new proceeding in disregard of the existing contract to pay A $1000, and would amount only to a forcible displacement of that contract, and the forcible substitution of a new one in its place. (See further as to the conclusive and absolute right to the damages awarded, whether the assessments have or have not been collected, *Ganson* v. *City of Buffalo*, 2 Abbot's Court of Appeals Decisions, 236, 243.)

3. It is said that the Legislature has only changed the form of the *remedy*, by substituting for an *appeal*, (the *right* to which is assumed by the Counsel for the City to have existed when the Act of Feb. 27, 1871, was passed) a revision of the whole proceeding by *motion;* and that this is an ordinary exercise of legislative power, which does not impair the obligation of any contract.

Now let us see, in the first place, to what this alleged right of appeal, if it existed, amounted. As we have said, an appeal *by the city*, the actor, from a decree or order of the Court which had given it what for a public object it had been authorized and *commanded* to acquire, could not vacate or set aside that part of the order which had accomplished the acquisition and executed the legislative will. The directions of the special law of May 17, 1869, are not merely permissive, they are mandatory also. The Act is entitled, "An Act to alter the map or plan of the City of New York, and to carry the alterations into effect." The Commissioners of the Central Park, who were to make the new lines of the street, were peremptorily directed to file in the proper office the proper maps and certificates for the establishment of new lines of the street; and the Commissioners who were to make the report of damages, &c., were *required* to designate the time for the *actual opening* of the new part of Broadway. All this it is to be presumed was done; and it was actually done as the Act commanded. The City, therefore, could not go back and undo all this, by taking an appeal from the Special to the General Term. The General Term could not vacate that part of the order of confirmation which fixed conclusively the acquisition of these lands for a public purpose, and fixed the time when the new street was to be opened. The utmost that an appeal by the City could do, even if it existed and was taken, was to open each man's award, and inquire into its *separate* merits; and even this seems to be entirely inconsistant with the provisions of law which required all errors to be corrected before the report had been confirmed.

But if we get over this difficulty, no power can be claimed for the General Term on an appeal by the City, beyond the power of reviewing each man's award and correcting it if necessary, *on the same evidence that was before the Commissioners.* Such, in its utmost extent, was the alleged right of appeal on the part of the City.*

Let us next see what this Act of Feb. 27, 1871, undertook to do. It is not averred in the plea that there was any irregularity, excess, or even want of equity, in the award made to the Plaintiff-in-error. But the plea avers that the whole of the order of confirmation, made by the Special Term Dec. 28, 1870, was, on the 3d April, 1871, vacated, annulled and set aside, and a new reference made to other Commissioners, under the authority of the Act of Feb. 27, 1871, by another Special Term, proceeding on a motion authorized to be made by the City. Was this equivalent or in any way analogous to an *appeal* from the Special to the General Term on the original order of confirmation? Did it leave the Plaintiff-in-error in the same position and with the same rights that he would have had under an appeal? On the contrary, it swept away, or undertook to sweep away, entirely, his right of action on the award that had been confirmed to him; and it undertook to do this, not on account of anything wrong in *his* award, but on account of alleged irregularities or excesses in *any* of the awards. The remedy for the private owner, on his own award, could not be taken away in order to give the city a new remedy to redress possible errors or irregularities in the proceeding generally. The doctrine that the Legislature may give new remedies is subject to this very important qualification; that the remedy which is vested in another party as a material part of his contract, shall not be impaired. In *Von Hoffman v. Quincy*, 4 Wallace, 535, this whole subject of changes of remedy was elaborately reviewed

*On motion to confirm the report, neither the damages nor the assessments were open to review. Matter of Central Park, 16 Abbott's Pr. R., 50; 51 Barb., 277. Mayor, &c., v. Erben. 39 New York, 805.

by this Court, and the former authorities were again affirmed, showing that laws which undertake to regulate remedies, if they so change the nature and extent of the existing remedies as materially to impair the rights and interests of a party claiming the performance of a contract, are just as much violations of the contract as if they overturned it. In the present case, the law of Feb. 27, 1871, does both. It not only gives the City a remedy which was no part of the existing law when the contract with the Plaintiff-in-error accrued, and annuls the remedy of an action to recover and collect the amount of his award, but it undertakes to abolish his contract entirely by setting aside the decree or order of confirmation which brought that contract into existence. It is closely analogous to the case of *Gunn* v. *Barry*, decided at the last Term of this Court. 15 Wallace, 610. There, by a law in force at the time a certain judgment was rendered, judgments were a lien on the lands of the debtor. The Constitution of the State, made subsequently to the recovery of this judgment, authorized to be set apart for heads of families, &c., a certain amount of land as a *homestead:* and the Legislature passed a law for this purpose. This Court held it utterly void, in its application to this particular judgment, and used the following language: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provision of the Constitution or the Legislation of a State, fall within this category, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed."

This proceeding under the Act of Feb. 27, 1871, has been likened to the setting aside of a judgment. There is no anology between this exercise of legislative power to annul a vested right, and the exercise of the judicial power to open and correct judgments. A judgment

of a court of ordinary jurisdiction is never conclusive against the power of the Court to correct its own proceedings, for cause shown. A statute proceeding, however, for the acquisition of lands by a public or private corporation, which is expressly made conclusive at a certain stage, and which results, therefore, in a contract between parties, can be subject to review only in such mode as the statute itself provides.

"The rule is, that proceedings by which the citizen is deprived of property must, in all matters of substance, in all things that are essential to protect and preserve the rights of the property-holder and the citizen who is to be burdened, conform to the statute by which they are authorized."

Allen, J., Court of Appeals, 50 N. Y. R. 494.

We say this, pointedly, notwithstanding the apparent tendency of the decision of the Court of Appeals in reference to this same proceeding, reported under the title, "*In the matter of widening Broadway.*" 49 New York, 150.

That case arose and was decided as follows: One Depeyster, a party in whose favor an award was made in this original Broadway proceeding, appealed to the General Term from the order of the Special Term which set aside the original order of confirmation made Dec. 28, 1870. The General Term affirmed the order which set aside the original confirmation. Depeyster then appealed to the Court of Appeals. The opinion of that Court was delivered by PECKHAM, J. It placed the affirmance of the order annulling the confirmation, not on the Act of Feb. 17, 1871, under which the proceeding to procure the annulment took place, but on an assumed inherent power in the Supreme Court to review the original proceeding for irregularity, mistake or fraud, independent of that Act. This was a clear mistake, or inadvertance; for the motion to annul the original order of confirmation was not one addressed to the general or inherent power of the Court, but it was a special motion, made by the City, (as is averred in the plea in the present case) under

the Act of Feb. 27, 1871, and it was signed by the Mayor under the authority given him by that Act to make the application. This mistake deprives this decision of the Court of Appeals of all weight or authority on the present question. *First*, because Mr. Justice Peckham reasoned from the general power of courts to open and correct their judgments to the existence of the same power over a statute proceeding for the acquisition of lands, when the law regulating the proceedings expressly provided for revisions before a certain stage, and then made that stage "final and conclusive." He says, indeed, that the confirmation was "final and conclusive" in reference to an appeal therefrom, but not as to the remedy by motion to set it aside for irregularity, fraud or mistake. But the point involved in the appeal before him was not the existence of such a general inherent power, but the power of the Legislature to authorize a motion to set aside an order of confirmation made after the period had expired for correcting errors in the manner provided by the law which governed the original proceeding. In such a case, the general inherent power of the Court to correct judgments can have no application in determining the time or sense in which the order of confirmation becomes conclusive. *Secondly*, Mr. Justice Peckham entirely overlooked the element of contract, and therefore this Court, which must judge of the contract for itself, is not bound to regard this decision as any evidence that the case is not one of contract, to which the ordinary powers of courts over their judgments have no application. What Judge Peckham, speaking for the Court of Appeals, held, was that the original order of confirmation was not "final and conclusive" against a general power of the Court to entertain a motion to revise it, or some part of it. What this Court has now to decide is, whether it was not "final and conclusive" as against any power of the Legislature to pass an Act authorizing the Court to annul and set it aside entirely, after it had resulted, according to the provisions of existing laws, in a contract to

pay the Plaintiff-in-error $40,000 for the land which the city had acquired from him.

Judgments may be opened and corrected by the Courts which render them. But a judgment which remains for execution according to laws in force at the time it was rendered, cannot be affected by subsequent legislation which takes away a right given by the laws as they stood when it was rendered.

Gunn *v.* Barry. 15 Wallace, 610.

With regard to the supposed inherent power of the Court, independent of the Act of Feb. 27, 1871, to set aside and annull the order of confirmation after it had been made and entered, it may be asked, if such a power existed, why was the Act of Feb. 27, 1871, passed? What necessity existed for the extraordinary interposition of the Legislature, if the Court had the general power which Judge Peckham attributed to it, and which he likens to the power over judgments? The truth is, that the legislative creation of a special motion to get rid of the order of confirmation, is the strongest possible proof that the Court had no general and inherent power over it antecedent to the passage of the law. Judge Peckham observes, "It is a conceded power of the Court to hear such motions in ordinary cases of judgments or orders in suits there pending, *and no reason is perceived why the Court does not possess and should not exercise the like power in cases of this character.*" Although the reasons were not perceived, at the time this opinion was given, they are numerous and weighty. One conclusive reason is, that this is a statute proceeding, strictly defined in its mode, and resulting, not in an ordinary judgment, but in a special contract. The Court must pursue the statute, and can exercise no power over the proceeding excepting those which the statute confers. Many other reasons might be mentioned, for the distinction between this case and the case of an ordinary judgment. In fact, the Court of Appeals, when the subsequent case in 50th

New York, R. was before them, did perceive and give full effect to the statute requirements and to the reasons on which they are founded. The reasoning of Judge Allen in the latter case is a complete answer to that of Judge Peckham in the former. (See the opinion of the Court of Appeals in The Matter of Commissioners of Central Park, 50 New York, 493.)

4. All that we have previously said in regard to the supposed right of appeal, or the supposed inherent power of the Court to entertain a motion to set aside the order of confirmation independent of the special motion subsequently created by the Act of Feb. 27, 1871, relates to the construction and application of the Act of 1813. We will now show that if the provision of the Act of 1813 with regard to the finality and conclusiveness of the order of confirmation is disregarded, or *if in a proceeding under that Act*, a right of appeal from the order of confirmation would have existed, the special Act of May 17, 1869, intended that *this* proceeding, for widening and straightening Broadway, should be *commenced in and be finally consummated by a Special Term of the Supreme Court without any right of appeal to the General Term.* This is apparent for the following reasons: *First*, the title of the Act—"An Act to alter the map or plan of the City of New York, and to carry the alterations into effect"—shows an intent to create a special proceeding, by which, within the time limited, the proposed improvement could be effectually consummated. It is plain on the face of the Act, when taken in connection with its title, that the public exigency which demanded the improvement was regarded by the Legislature as urgent. There was ample power, under the existing laws, to effect this improvement by a slower process; but a special process was deemed needful in this particular case, in order to consummate the alteration of the street in the most summary manner consistent with justice to the rights and interests of the adjoining owners. Hence the title of the Act, which aptly describes

what the Act itself was intended to be. *Second:* By the 1st section of the Act, the Commissioners of the Central Park were peremptorily commanded, within four months after the passage of the Act, to locate and establish the new lines of the street, in described dimensions, and to cause duplicate certificates and maps of the new lines to be filed in certain public offices, and these maps and certificates were made "final and conclusive" as to the extent and boundaries of the improvement. The section further declared the part of Broadway so laid out "a part of one of the streets of the City of New York," in like manner and with the same effect as if it had been so laid out on the map or plan of the City made under an Act passed in 1807. *Third:* By the second section of the Act, so soon as the new lines of the street had been established on the proper records, the Corporation Counsel was authorized and *required*, for and in behalf of the Corporation, and for public use, *to acquire title*, in the name of the Corporation, to the lands required to widen and straighten the street in the manner described in the certificates and maps; and for that purpose to apply to the Supreme Court *at any Special Term* for the appointment of Commissioners of Estimate and Assessment for such widening and straightening of Broadway: and these Commissioners were authorized and *directed* to make their report to the Supreme Court within eight months after their appointment, and *therein to designate the time for the actual opening* of the new part of Broadway. *Immediately after* the expiration of the time so designated, it was provided that all buildings on the line of the improvement shall be removed, and that the street shall be regulated and graded by the proper department of the City Government. Special rules for the award of damages and the laying of assessments for benefit were laid down in this section, and a mode was provided by which title to any lands that were to be closed under the Act, comprehended in the old lines of the street, could be acquired by the abutting proprietors, by payment of certain awards to be made for the value of a surrender of

the public easement, with interest thereon *from the day of the confirmation of the Commissioners' report.* The third section of the Act made it take effect immediately.

It is thus clear that it was assumed, that at the end of twelve months at least from the passage of the Act, *and as much sooner as the proceeding could be consummated,* the public could be put in possession of the actual use of the new street. It is equally clear, that under the provisions of the Act, just so soon as the new maps and certificates were made and filed, the new lines which the street was to have were finally and conclusively fixed, in contemplation of law; and that just so soon as the report of the Commissioners of Estimate and Assessments was confirmed by the Court to which it was to be made, the title to the lands was acquired by the City, and the time for the actual removal of all buildings thereon and for opening and grading the new street was fixed by law. All this took place on the 28th of December, 1870, about *seven* months after the passage of the Act. The 31st December, 1870, was designated in the report of the Commissioners for the actual opening of the street.

The whole proceeding was therefore legally and judicially consummated on the 28th of December, 1870; and it is perfectly clear, on the provisions and peremptory directions of the Act, that the Legislature intended that the proceeding should be finally consummated *in and at a Special Term of the Supreme Court,* without the indefinite delay of an appeal to the General Term. Even if such an appeal would lie in a proceeding conducted solely under the act of 1813 and its supplementary Acts, it is apparent that this special Act of May 17, 1869, is inconsistent with the allowance of such an appeal; for if an appeal is to be regarded as a suspension or postponement of the acquisition of title, such an appeal could not be taken without frustrating the manifest intent of the Legislature, which passed this Act, to have the new

street in existence and actual use at the end at least of twelve months, and as much sooner as practicable.

In the *fourth* place, it is manifest, that the subsequent Legislature, which passed the Act of Feb. 27, 1871, of which we complain, understood that no appeal in this proceeding could be taken under the Act of May 17, 1869, because they undertook expressly to create an appeal from this particular order of confirmation, which had already established certain public and private rights. There can be no higher evidence than this, that no appeal could have been taken from the order of confirmation, without the direct and subsequent intervention of the Legislature. Whether that intervention was rightful and constitutional, depends, not upon the general power of the Legislature to give new rights of appeal in judicial proceedings, but upon its power to vacate a contract that has resulted from the complete execution of a law, according to its terms, that law being a proceeding by which private property was to be taken for public use. Moreover, the Act of Feb. 27, 1871, which authorized the vacating motion, authorized that motion to be made before a single Justice of the Supreme Court, *either at Special Term or Chambers;* without providing for any review of the motion by the General Term. This again shows that in the understanding of the Legislature, which passed the last mentioned Act, the original confirmation might be vacated by an extraordinary motion to be made to *the same form of the Court which had passed the order;* a summary mode of getting rid of the order of confirmation, without going to the General Term at all, either by an appeal, the right to which might have previously existed, or by the new appeal authorized by the Act of Feb. 27, 1871. And, as appears by the plea, this was the course taken: for it is averred in the plea that the order of confirmation, made Dec. 28, 1870, was vacated, annulled and set aside by a Judge of the Supreme Court *at a Special Term*, proceeding on a motion made under the Act of Feb. 27, 1871, and that an entire new order of reference was made

to other Commissioners. This of course, when carried out, cut off all possibility of an appeal, by any of the parties, to the General Term, on the original order of confirmation, and all revisions by the General Term of the merits or regularity of the report and its confirmation, if the right to such revision existed.

5. This extraordinary proceeding has been defended on the ground that it was an exercise of legislative power to prevent a wrong; and we are told that "there is no such thing as a vested right to a wrong." The case of *Freeborn v. Smith*, 2 Wallace, 171, has been cited to this point. Our answer to this is three-fold. In the first place, we are not claiming a vested right to a wrong. We are claiming to enforce a contract, by the protection which the Constitution affords to its obligation. In the plea that is interposed as an answer to our action on that contract, it is not alleged that there was any wrong in our award, or that the damages awarded to us were excessive, or unjust to anybody. It is in substance simply averred that it was the legislative will that our contract should be annulled, if it should be found on a motion that there was any wrong in any part of the proceedings which had been consummated.

In the second place, the doctrine of the case of *Freeborn v. Smith* contains an important qualification of the power of a Legislature to redress supposed wrongs. Mr. Justice Grier, in that case, said, "It is well settled that *when there is no direct Constitutional prohibition*, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings." Now the constitutional prohibition against State laws which impair the obligations of contracts, operates directly as a restraint upon the power of the State Legislatures to give new remedies, or to modify existing remedies, or to remove impediments in the way of legal proceedings. If a

legal proceeding has been so consummated, under a statute which makes it final and conclusive, that it has resulted in an executory contract between parties, the Legislature has no power to give a new remedy that will abolish the contract. Whatever new remedy is given to redress supposed wrongs, or irregularities, must leave the obligation of the contract unimpaired. *A fortori*, a contract with A. cannot be set aside, in order to give a new remedy to redress wrongs in a contract with B.

In the third place, this statute proceeding admitted of the most ample redress of all supposed wrongs or irregularities, before the confirmation of the report had brought into existence a contract with each separate owner of a separate parcel of land. The impressive language of the Court of Appeals in regard to the operation of the Act of 1813, may here be applied to the legislative as well as to the judicial power over the order of confirmation. "Whether the report was in proper form, the proceedings of the Commissioners legal, and the decisions upon questions of law right, and whether the report was fair and just upon all the evidence, was determined by the Supreme Court, and when the law declares the order of that Court is final, it cannot be reversed upon any suggestion of irregularity, mistake or error, either of law or fact." (50 N. Y., 493–498.) If this is true, the confirmation must have resulted, in a contract, which no subsequent Legislature could annul, after the confirmation had become final; and even if a naked *right* of appeal existed, by which the order of confirmation could be revised by the General Term, the order was final when no appeal was in fact taken. And even if an appeal had been taken, the order would have remained final, as fixing the contract, until the appeal had been acted on and the order which gave the Plaintiff-in-error a right to demand $40,000 had been reversed in respect to his particular award. But we deny that any right of appeal existed, for the reasons already assigned.

IV.

We have thus far considered the bearing of the Act of 1813, as having fixed the period when the contract with the Plaintiff-in-error arose, namely, on the confirmation of the Commissioners' report on the 28th Dec., 1870. But it will perhaps be argued that the provisions of the Act of 1813, which fixed the time when the Corporation was to be seized in fee of the premises taken, was so modified by an Act passed in 1818, that the time for the vesting of the fee in the Corporation was not to be on the confirmation of the report, but was to be at a subsequent period: and that when the Act of Feb. 27, 1871, was passed, this period had not arrived. The case of *Detmold v. Drake*, 46 New York, 318, will probably be cited to sustain this view.

The Act of April 20, 1818, was a law which authorized the City Corporation to suspend the actual opening of a new street for a period not exceeding fifteen months from the confirmation of the Commissioners' report; and which also made the right of action on the awards to commence running, at the end of four months after the expiration of the time so fixed by the Corporation. (See blue pamphlet, p. 16.)

Detmold v. Drake decided that under this Act, modifying so far the Act of 1813, the title did not become absolute in the city until the Corporation had taken possession, *or* until the time fixed for the suspension of the work, or the fifteen months, expires, and that until the title of the owner is thus fully divested, he can recover from a tenant for the use and occupation of the premises.

But whether the Act of 1818 was applicable to this particular proceeding under the Act of May 17, 1869, depends upon the construction and operation of the latter. At the time of the passage of this latter Act, there were two modes in which an alteration of the lines of Broadway might have been effected. It might have been done under the Acts of 1813

and 1818; in which case, both of those Acts would have to be considered together, in determining the point of time at which the City would have acquired title. Or, an application might be made to the Legislature to pass a special law, to meet the exigencies of the particular case, and to apply the standing laws to this particular improvement in a special manner. The latter was the course taken; and in the 2d Section of the special law of May 17, 1869, it was provided, that, "all Acts and parts of Acts now in force relating to opening, widening, closing, laying out, grading, regulating, sewering, paving and improving streets and avenues in the said City, shall apply *to that part of Broadway so laid out, and to all proceedings under this Act, so far as the same are applicable, except as hereinbefore or hereinafter provided.*" It follows from this provision, that if the special Act of May 17, 1869, made a system for acquiring the title to the lands needed for this improvement, inconsistent with the application of the Act of 1818, that Act would not be applicable to the proceeding, but the Act of 1813 would remain unaffected by the Act of 1818 in its application to the question as to the time when the Corporation would acquire title. That such is the case, is apparent. Departing essentially from the standing law of 1813 *as modified by the law of* 1818, the special Act of 1869 created the following system for this particular case: Within four months from the time of the passage of the Act, the proposed new lines of the street were to be established of record, and thereafter the legal boundaries of the street were conclusively fixed. So soon as this was done, ("*When* the said Commissioners shall have caused the said certificates and maps to be prepared and filed, &c."), the Corporation Counsel was *required*, on behalf of the Corporation, to *acquire title* to the lands needed, by applying to the Supreme Court at *any special term* for the appointment of commissioners of estimate and assessment. These commissioners were required to report *within eight months after their appointment, and in their report to designate the time for the*

actual opening of that part of Broadway that was so to be widened and straightened. *Immediately after the expiration of the time so designated*, all buildings and parts of buildings were peremptorily required to be removed, and the proper department of the City Government was peremptorily directed to regulate and grade the street. With respect to the *time* when the awards were to be paid, the Act made no special provision; but it took care to stipulate that the City Chamberlain should pay them to the parties entitled thereto; and from this it follows that the *time* when those parties could demand payment, would depend on the provisions of the Act of 1813, because those provisions were applicable, nothing inconsistent with them being found in the special Act. But with respect to the power of the City, under the Act of 1818, to postpone the period of acquisition of title, or with respect to its postponement by the mere operation of that Act without any action of the City, it is manifest that the special Act of 1869, is inconsistent with such postponement beyond the period fixed by the confirmation of the report. If, in obedience to the special law, the time for the actual opening of the new street was fixed, for example, to be on the 31st of December, 1870, by the report of the Commissioners; if their report was confirmed at a Special Term on the 28th of December, 1870; and if *immediately thereafter* the former owner must surrender his land and the street be regulated and graded, the rights of all parties were fixed by the confirmation of the report. There was no period remaining, after that confirmation, when the former owner could exercise any right of occupation, or when the City could say it had *not acquired title.*

A contract had arisen, whereby—as compensation for the fixed right to enter on and possess the land for actual occupation as part of the street on the 31st of December, 1870—the City had stipulated to pay the owner the amount awarded as his damages, within or at the expiration of the time fixed by the standing law of 1813, namely, four months from

the confirmation of the report. If the Corporation had passed an ordinance or resolution, postponing the time for taking possession, it would have been utterly void ; it would not have varied the contract in the slightest degree ; for the terms of the special Act of 1869 peremptorily required the Corporation to enter upon, and the former owner to surrender, possession, *immediately* after the expiration of the time fixed in the report for the actual opening of the street. This will also dispose of the suggestion, if made, that by the mere operation of the Act of 1818 the City had a remaining period of fifteen months after the confirmation of the report, within which to exercise an option of finally acquiring the land. We maintain, therefore, that by force of the provisions of the special Act of 1869, the Act of 1818 was inapplicable to this proceeding. The same result follows from the provisions of the Act of 1871, of which we complain ; for that Act, by creating a special appeal from the order of confirmation, and a special motion to get rid of that order, which newly created rights were to be exercised by the City *within four months from the date of confirmation of the report*, shows that the Legislature which passed this new Act were aware that at the expiration of four months from the date of the order, the parties to whom awards had been made, would have the right to collect them by suit, if they were not annulled during that time. The effort to annul them, however, was an effort to annul a contract over which the Legislature had no control.

V.

It might be a good test of the Constitutional validity of the Act of Feb. 27, 1871, to inquire whether the Legislature could at that time have simply repealed the Act of May 17, 1869, and thus have put an end to the contract with the Plaintiff-in-error. It has been intimated by the State Judge who passed the order annulling the original order of

confirmation, that the Legislature might have repealed the whole proceeding.*

That it could have passed a law repealing that part of the Act of 1869 which created the new street—that it could have dispensed with this public improvement of a thoroughfare of one of its municipal corporations—may be admitted. But that it could in February, 1871, have absolved that corporation from its obligation, contracted on the 28th of December, 1870, to pay the Plaintiff-in-error $40,000 in consideration of the title which it then acquired to his lease-hold estate—a contract which extinguished his right to occupy the building upon it on the 31st of December, 1870—is an extravagant proposition which does not need examination. Even if the City had a right of appeal from the order of confirmation, and had taken such appeal, the Plaintiff-in-error could exercise no acts of ownership after the 30th of December, 1870, and the City could have removed his building at any moment thereafter. In contemplation of law, his building, after that date, stood upon a part of a public street duly recorded as one of the streets of the City. Is he to be deprived of the compensation fixed by law for this deprivation of his property, upon the suggestion and the afterthought that others had obtained improper awards, or that the proceedings were irregular?

SUMMARY.

Our positions therefore are:

1. That under the Act of 1813, no appeal lay from an order of confirmation that had been made by any form of the Supreme Court to which a report of Commissioners had been made and by which such report had been acted upon.

* Judge Cardozo, who is not now on the Bench.

2. That if, in a proceeding under the Act of 1813, an appeal could be taken from an order of confirmation passed at a Special Term of the Supreme Court, such appeal did not vacate or annul the order, or postpone the time at which the title vested in the City, and the right to the damages awarded vested in the party in whose favor the award had been made. The appeal would only operate as a revision of the merits of each award.

3. That if an appeal could be taken by either party in a proceeding under the Act of 1813, the provisions and intent of the Special Act of 1869 gave the Special Term both original and final jurisdiction, in this particular proceeding, and are inconsistent with any appeal to the General Term.

4. That the Act of 1818, giving the City the right to postpone, or operating of itself to postpone the period when the City would acquire title, is inapplicable to this proceeding under the special Act of 1869, which latter is inconsistent with and repugnant to the provisions of the Act of 1818, and therefore it excludes them.

5. That the Act of 1813 is applicable to this proceeding, in respect to the vesting of title in the City and the vesting of the right to the damages awarded in the former owner of the land, because the special Act of 1869 makes no provisions that are inconsistent with the application of this part of the Act of 1813, and therefore it adopts them.

6. That even if the right to an appeal existed under the Act of 1813 and was applicable to this proceeding under the Act of 1869, the motion to annul the order of confirmation, created by the Act of 1871 after the order of confirmation was passed, was in no way analogous or equivalent to an appeal, but it destroyed a remedy for the Plaintiff-in-error, which was an essential part of his contract, by creating a new remedy to enable the Corporation to get rid of the contract.

7. That the contract between the City and the Plaintiff-in-error, arose on the confirmation of the report, Dec. 28, 1870, by reason of which the City became finally vested with title and with the right to possession and use of his land on the 31st of Dec., 1870, in consideration of which the City became bound to pay him the sum awarded to him by the confirmation of the report.

8. That the obligation of this contract was impaired by the Act of Feb. 27, 1871.

Second Ground of Demurrer.

The remaining ground of Demurrer is that the Act of Feb. 27, 1871, by authorizing the annulment of the award theretofore made to the Plaintiff-in-error, violated the Constitution of the State.

The Constitution of New York, like that of other States, embodies that provision of *Magna Charta* which extends to individual rights the protection of the "law of the land." In the Constitution this protection is expressed in two forms: in Art. I, Sec. 1 it is declared that no citizen shall be deprived of any "right" "unless by the law of the land or the judgment of his peers;" and in Sec. 6 of the same article it is declared that no person shall be deprived of "property," "without due process of law." In their application to cases of the nature of the present one, these two phrases mean substantially the same thing. They recognize that class of interests which are known to our constitutional law as "vested rights;" a designation which embraces both what is usually denominated property, and interests which are in the nature of property because there is a present vested interest in the right to the present or future enjoyment of something of pecuniary value. What these constitutional provisions mean, in their application to rights of this description is—that the

citizen is not to be deprived of them by the arbitrary will of the Legislature expressed in an act which simply takes them away or destroys them, but that they can be divested only by legislation that fulfills the requirements of those fundamental principles of justice which have been established for the protection of private rights.

Westervelt v. Gregg. 12 New York, 209.
Bank of Columbia v. Oakley, 4 Wheat, 235.
(*Per* Johnson, Justice, defining the meaning of the corresponding provision in the Constitution of Maryland.)

1. An award of damages made according to existing laws, as the compensation for private property taken for public use, becomes, on the final adjudication which fixes the taking and the amount of the damages, a vested right, whether the compensation is payable immediately or at a future time.

The People *v.* The Supervisors of Westchester, 4 Barbour, 64.
Harrington *v.* The County Commissioners of Berkshire, 22 Pick., 263.

2. Such a vested right cannot be taken away by a repeal of the law under which the award was made, or by a discontinuance of the proceedings for establishing the high-way, whether possession has or has not been taken, or whether the day of payment has or has not arrived.

People *v.* Westchester, *ut supra.*
Harrington *v.* The Commissioners, &c., *ut supra.*

In the Matter of Canal Street, 11 Wendell, 154, (Savage, Ch. J.), it was held that under the laws relating to the City of New York, the corporation might discontinue the proceeding, at any time before rights had become vested either in the public or individuals; that rights did not vest until the

confirmation of the report of the commissioners; but that after such confirmation, the merits of the awards cannot be reviewed and revised—they are like the awards of an arbitrator.

3. On the confirmation of the award made to the Plaintiff-in-error, the fee of his estate vested in the City, the right to the sum of $40,000 vested in him, together with a statutory right to recover that sum at the end of four calendar months from the time of the confirmation. The argument which has heretofore shown that the confirmation of the award by the Special Term of the Supreme Court was a final adjudication, need not be repeated here. (See this Brief, *ante.*) A vested right of action to recover a sum of money, capable of being enforced, although it has not been effectually enforced, is held in the State of New York to be "property," of which the owner cannot be deprived without "due process of law;" and an act of the Legislature, passed after such right is vested, and which destroys such right by vesting the property in another, is not "due process of law."

Westervelt *v.* Gregg, 12 New York, 209.

We consider this case of *Westervelt* v. *Gregg*, the authority of which has never been questioned, as decisive upon the present question. The vested right there involved was the right of a husband, under the existing laws of the land, to receive a legacy left to his wife during coverture. His sole title to the money depended upon laws existing when the legacy was bequeathed. The legacy had not been reduced to possession, when the Legislature passed an Act making all the property of married women, whether owned at the time of the marriage, or acquired during coverture, their separate property, as if they were *femes sole*. The Court of Appeals held the law, in its application to this legacy, to be a law depriving the husband of a vested right of property "without due process of law." For the same reason, we claim that when a right of action to recover a

sum of money under a statutory proceeding, is vested, a law which annuls that right, is void, as not being "due process of law."

4. The Act of Feb. 27, 1871, entirely took away and destroyed the Plaintiff-in-error's award, and his right of action thereon, by authorizing the Court to set it aside, without making it necessary to institute any inquiry into *its* merits, before setting it aside, but authorizing it to be vacated for reasons affecting *any* of the awards made in the same proceeding. But the tenor and the text of all the statutes under which this proceeding was had make each owner's award his separate property; and a subsequent law which deprives him of it because the awards made to others were excessive or needed revision, cannot be "due process of law." If the Legislature had any power to give the City, while it retained the land, authority to open the Plaintiff-in-error's award and have a new assessment made in his case, they clearly had no power to authorize the Court to set aside *his* award and make a new assessment, because the other awards were incorrect, or unjust or inequitable. "Due process of law" as applied to the vested rights of individuals, clearly does not comprehend a proceeding by which an individual is to be deprived of his own rights for the wrongs of others, in which he did not participate and which in no way affect the merits of his claim. A careful examination of the Act of Feb. 17, 1871, § 4, in connection with the grounds on which Judge Cardozo set aside and vacated the whole of the order of confirmation, and directed a new assessment of damages through the whole route of the improvement, will show that not one of the assigned causes for this strange proceeding, which were authorized by the Act of 1871 to be inquired into, affected the Plaintiff-in-error's award. Those causes were, *first*, "error, mistake, irregularity, or illegal act in the said proceedings," &c. *Second*, that the assessment for benefit or the awards for damages, or *any* or *either* of them, were "unfair or un-

just, or inequitable or oppressive as respects the Corporation or any person affected thereby." Under the *first* head, Judge Cardozo found an irregularity in the proceedings, because the Commissioners, *without notice to the City*, altered their report in respect to an assessment for benefit and an award for damages, *on property belonging to the City*, after they had deposited their report for inspection in the proper office: and that although the Corporation Counsel moved the confirmation of the report, he did so without knowing of this illegality. But this, if true, *in no way affected the merits of the Plaintiff-in-error's award, or his right to* $40,000 *as his damages.* If it incidentally affected the sources from which the City was to reimburse itself for the money which it was to pay him, by making it necessary to revise the *assessment on other lands*, such revision would in no way touch the adjudged value of the land *taken* from the Plaintiff-in-error. *Second*, Judge Cardozo found that *some* of the awards of damages were excessive and extravagant, and were obtained on improper or incompetent proofs. But there is nothing in the whole proceeding which had any tendency to show that this charge was made against the Plaintiff-in-error's award; and the Counsel for the City can now only suggest that the first award made to him was excessive or improper, by informing this Court, irregularly, or in some way, that the award made to him by the *second* set of Commissioners, under the Act of 1871, was less than $40,000. This, if true, and if the Court can take notice of it, is no answer to his vested right to his original award, nor has it the slighest tendency to show that that award was improper. This Court cannot inquire into the reasons which governed the second set of Commissioners, or into the means that may have been used to affect their judgment. The only question for consideration here is whether the Plaintiff-in-error had a vested right to his first award, and whether he has been deprived of that right by "due process of law."

The Courts of New York have repeatedly had occasion to decide that "due process of law," when the vested rights of individuals are to be affected, requires, as the phrase "law of the land" requires, a judicial trial, by which it shall be ascertained that the right is forfeited, or that some one else has a superior title to the property, before the right or the property can be taken away: that there must be a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property.

Taylor *v.* Porter. 4 Hill, 140.
White *v.* White. 5 Barb., 474.
Westervelt *v.* Gregg. 12 New York, 202.
2 Kent, Com. Part 4. Sect. 24, p. 623 and note C.

Argument is needless to show that when an individual is to be deprived of a right of property vested in him by the law of the land, a trial, which deprives him of it for reasons that affect not his title but the title of some one else, is not "due process of law," although he may have been cited or notified of the proceeding.

We claim, therefore, that the judgment of the Circuit Court should be reversed, and a *venire de novo* awarded, to try the plea of the General Issue, in conformity with such directions as this Court may be pleased to give, with respect to the finality of the order of confirmation set forth in the Plaintiff-in-error's declaration.

GEO. TICKNOR CURTIS,
of Counsel with the Plaintiff-in-error.

JNO. C. SHAW,
Attorney for the Plaintiff-in-error.

Supreme Court of the U. S.

No. 438, Oct. Term, 1873.
No. 156, Oct. Term, 1874.

DANIEL GARRISON,
Plaintiff in Error,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants in Error.

Brief for Defendants in Error.

AARON J. VANDERPOEL,
Of Counsel.

E. DELAFIELD SMITH,
Counsel to the Corporation.

NEW YORK:
EVENING POST STEAM PRESSES, 41 NASSAU ST., COR. LIBERTY.

1875.

EVENING POST STEAM PRESSES, 41 Nassau Street, cor Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

DANIEL GARRISON,
Plaintiff in Error,

agst.

THE MAYOR, &C., OF THE CITY OF NEW YORK,
Defendants in Error.

Brief for Defts. in Error.

In error to the Circuit Court of the United States for the Southern District of New York.

The plaintiff, a citizen of New Jersey, sues the Corporation of the city of New York for the amount of an award made to him for lands required in the widening and straightening of Broadway, between Thirty-fourth and Fifty-ninth streets.

FACTS.

On the 17th of May, 1869, the Legislature of the State of New York passed an act entitled "An Act to alter the map or "plan of the City of New York, and to carry the alterations "into effect."

N. Y. Sess. Laws of 1869, Chap. 890, Vol. 2, p. 2236.

Amended Laws 1870, Ch. 657, Vol. 2, p. 1513.

The first section declared that Broadway, between Thirty-fourth and Fifty-ninth streets, should be widened and straightened in the manner provided by the act. The Central Park Commissioners were required to lay out and establish the lines; certificates and maps of the location of the lines were to be filed, which should be final and conclusive as to the extent and boundaries, and the part of Broadway as so laid out should be one of the public streets, in like manner and effect as if it had been so laid out on the plan of the city by the commissioners under the Act of 1807. Any part of Broadway not embraced within the new lines was to be closed, and the acts of the Legislature in force as to the opening, widening, etc., were made applicable, except as special limitations were found in this act.

These laws, so far as necessary for consideration in the present case, may be conveniently found.

Laws 1813, chap. 86, vol. 2, p. 408.

The statutes, with the amendments, are collected in Valentine's edition of Laws relative to the city of New York, p. 1190, *et seq.*

Laws 1818, chap. 210, p. 196.
Laws 1839, chap. 209, p. 182, sec. 9.
Laws 1854, chap. 270, p. 592.

By section 2 of the Act of 1869, the Corporation counsel was required to take the legal steps to acquire title, and to that end to apply to the court for the appointment of Commissioners of Estimate and Assessment. The commissioners were authorized to assess not more than one-third of the total expense on the Mayor, Aldermen and Commonalty, and to direct in their report the time for the actual opening of the street as so straightened and widened.

The commissioners were required to make a just and equitable estimate and assessment of the loss and damage, if any, over and above the benefit and advantage, or of the benefit and advantage, if any, over and above the loss and damage, as the case might be, to the respective owners, lessees, occupants or owners, and persons entitled to or interested in the lands

and premises required or affected by the said proceedings, but were required to confine the assessment for benefit and advantage within certain limits.

If any portions of Broadway were closed, any owner of land then fronting on Broadway and abutting on any part so closed might acquire the title to so much of any part so closed as lay immediately in front of his premises; and all awards to the Mayor, Aldermen and Commonalty were to be placed by the chamberlain to the credit of the sinking fund, and any and all other awards were to be paid by the chamberlain to the parties entitled thereto.

Under this, three Commissioners of Estimate and Assessment were appointed by the Supreme Court, who, in their report, awarded to the plaintiff, for his property taken, the sum of $40,000.

The report was confirmed at the Special Term of the Supreme Court, by an order made on the 28th of December, 1870.

For the amount so awarded the plaintiff in error brings this action.

The fact that the commissioners' duties had probably not been properly performed came to the notice of the Legislature, and on the 27th of February, 1871, an act was passed which provided by its first section that an appeal might be taken by the Mayor, Aldermen and Commonalty from the order of the Special Term confirming the report of the commissioners, to the General Term, at any time before the expiration of four months from the date of the order of confirmation; such an appeal to be heard as an appeal from a non-enumerated motion, and entitled to a preference on the calendar over all other appeals and business.

The *second section* declared that the appeal should be heard upon the merits with the like effect as if it was an original motion for the confirmation of the report of the commissioners.

The *third section* provided for giving notice of appeal, and securing a hearing to all parties.

The *fourth section* was as follows:

Within the time hereinbefore limited for the taking of said appeal, and notwithstanding the pendency thereof, the said

Mayor, Aldermen and Commonalty may, at their option, move before a justice of the Supreme Court, in the First Department, either at Special Term or Chambers, to vacate the said order heretofore made at Special Term, confirming said report.

And it shall be the duty of the said court or justice, at which or before whom such motion may be made, to hear the same, and if it shall appear to the said court or justice that there was any error, mistake, irregularity or illegal act in the said proceeding for the widening and straightening of Broadway, at any stage of the said proceedings, or if it shall appear to the said court or justice that the assessments for benefit or the awards for damage, or any or either of them, have been unfair and unjust, or inequitable or oppressive, as respects said Mayor, Aldermen and Commonalty, or any person or persons affected thereby, the said court or justice shall vacate said order of confirmation, which shall thereupon be null and void, and shall refer the matter back to commissioners, who shall proceed to amend and correct the said report or to make a new assessment, in whole or in part, as the court or justice shall direct, and report to the court. The section further provides for the presentation of the report to the court for confirmation; removes a limitation contained in the original act as to the area of assessment for benefit.

The *fifth section* relates to costs, and the *sixth section* regulates the mode of giving notice of motion.

It is alleged in the plea (fol. 21), "That prior to and at the time of the passage of said Act of the Legislature, the said order of confirmation in the declaration mentioned was, by the statutes of the State of New York, subject to review by the General Term of the Supreme Court, on the appeal being taken thereto by said Mayor, Aldermen and Commonalty, according to the course and practice of said court, and on the hearing of such appeal said General Term of said court were empowered to receive, modify or affirm the said order (at fol. 19). That the time for appealing from said order had not expired."

Notice of motion was given in the manner prescribed by the 4th section of the act, to set aside the order of confirmation.

When the matter came on for hearing, March 21, 1871, various parties appeared, and affidavits were read.

The court, after the reading of the various affidavits, heard the counsel for the respective parties, and on the 3d of April, 1871, made an order declaring that it appearing that there had been error, mistake, irregularity and illegal acts in the proceedings, and that the assessments for benefit and the award for damages had been unfair, unjust, inequitable and oppressive as respects the Mayor, Aldermen and Commonalty and others, vacated and set aside the order of confirmation, and appointed Alexander T. Stewart, John Q. Jones and James S. Hennessey, Commissioners, to amend and correct the report, and make a new award of damage and assessment.

To the plea setting forth the proceeding by motion to vacate the order of confirmation, and the action of the court thereon, the plaintiff demurred, presenting for consideration two objections:

1. That, in violation of the Constitution of the State of New York, it undertakes to divest vested rights contrary to the law of the land, and without due process of law.

Const. 1846.

SEC. 5. "No person shall be * * * deprived of life, liberty or property without due process of law."

2. That it violates the provision of the Constitution of the United States which prohibits the passage of a "law impairing the obligation of contract."

Art. 1, Sec. 10.

These objections were strenuously urged on the motion at Special Term to vacate the order, and were overruled.

See *opinion furnished herewith.*

An appeal was taken to the General Term, by John Watts De Peyster, a property owner to whom an award had been made.

The court decided:

1. That the evidence on the questions of fact decided by the Special Term was ample to sustain his conclusion.

2. That there was good reason for vacating the report wholly instead of limiting it to setting aside the proceedings only as to the city.

3. That the Act of 1871 was not subject to either of the constitutional objections urged against it.

4. That the judges, in confirming reports of commissioners in street cases, acted as judges and not as commissioners, and that the law was settled that the order in such cases was appealable to the General Term of the Supreme Court.

5. That if it was assumed that the declaration in the Act of 1873, that the order should be "final and conclusive," barred an appeal to the General Term, the order was of no more sacred character than any other judgment or order as to which the time for appealing had expired.

6. That the contract, so far as it became one, was to pay the actual value of the land—such price as it was worth; and there was no constitutional objection to the Legislature granting the power to the court (if it did not already possess it), on good cause shown, to open the question and cause a re-examination of value.

Hamphire Commonwealth, 19 Penn. St. R. 329

7. That this act did not repeal or annul a contract, but only authorized the court, on proof that the former inquiry was illegal and unjust, to have a new inquiry made as to the question of value.

In the Matter of Broadway Widening, 61 Barb., 483, Mr. De Peyster appealed to the Court of Appeals, where the order was affirmed.

Matter of the Application of the Mayor, &c., 49 N. Y. R., 150.

The question having been thus settled adversely to the plaintiff by the courts of New York, he has commenced his action in the Federal Courts.

First Point.

The act of February 27, 1871, was in all respects a valid exercise of legislative power. It is not in conflict with any provision of our National Constitution or of the State Constitution.

Hampton v Commonwealth, 19 Penn. 329-334

1. The act was merely an exercise of the power, which must be conceded as existing in a Legislature, of regulating the form of remedy by which the rights of all parties to a proceeding are to be ascertained.

2. The reversal or modification of a judgment by a court having jurisdiction in the premises, neither impairs the obligation of a contract nor interferes with a vested right. Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right is not to be favored.

Pearson *vs.* Lovejoy, 53 *Barb.*, 410.

3. It is not until all existing remedies have been exhausted and rights have become permanently vested, that all future interference by the Legislature and the Courts is prohibited.

4. Where there has been "mistake, irregularity and illegal acts," in the rendition of the judgment or order, courts of record have inherent power to correct or vacate the proceedings, except for some limitation prescribed by statute, or by the discretion of the court, where it appears that the injured party has been negligent in asking relief or new rights have intervened.

Second Point.

If we concede, for the purpose of the argument, that the confirmation of the report by the court created a contract of record between the city and the owner of the land, it certainly possessed no greater solemnity or inviolability than a judgment rendered in an action; and it would be a novel idea at this day if a court of record could not vacate its judgment for error, mistake, irregularity and illegal acts in the proceedings. A court discovering that its process and machinery had been abused, so that by reason of "error, mistake, irregularity and illegal acts" in its proceedings, its judgment was "unfair, unjust, inequitable and oppressive" to one of the parties, would not hesitate to declare it to be against good conscience to execute such a judgment, and that it ought to be, and should be annulled. On the theory, however, of the contention for the plaintiff in error, the court, on discovering the wrong perpetrated under the cloak of justice, would be powerless to vindicate itself, or to relieve the party cheated and defrauded, because to interfere would be to "impair the obligation of a contract," or "destroy a vested right."

1. The argument of the counsel must carry his proposition to the extent of denying the power to a court having "general jurisdiction in law and equity" to set aside its judgments for irregularity.

In the People and Taylor *vs.* The Mayor, 11 *Abb.*, 66, the court set aside three judgments on motion of the comptroller of the city, on the ground of collusion, fraud and irregularity, holding that on such an application the court would not look into the merits of the action, and that the motion was founded on a matter of right, resting on the existence of the collusion, fraud or irregularity.

Lowber *vs.* The Mayor, 26 *Barb.*, 262, A. D. 1857. The comptroller was sustained in a motion made by him to set aside a judgment alleged to have been recovered against the city by collusion with and by consent of the city offi-

cials. The court held that it had the power to exercise such an efficient control over every proceeding in an action pending in it, as effectually to prevent every person interested in the result from injustice and fraud.

2. It is argued that the plaintiffs "had a vested right to have the validity of the award tried in an action. If there was any fraud or error, or gross inequity to be set up by the city as a reason why it should not pay him $40,000, he had a right to have that question tried by a jury" (page 9). We are not advised how, in a suit upon a judgment, or an award of this nature, irregularity, error or gross inequity could be taken advantage of. These are objections frequently not appearing on the record, which must be taken advantage of in the original form, and in the original proceeding. In a suit a want of jurisdiction might be shown, but in this way only could the judgment award or order be attacked.

3. It is not and cannot be claimed that the grounds stated in the Act of 1871, upon which the court might act for recommitting the proceedings to commissioners are larger or broader than the court was authorized to act upon in setting aside and recommitting the proceedings to the same or new commissiones by the Act of 1813. The Act of 1813, sec. 178, enacted, "and upon the coming in of the said report, signed by the said commissioners or any two of them, the said court shall by rule or order, *after hearing any matter which may be alleged against the same*, either confirm the said report or refer the same to the same commissioners for revisal and correction, or to new commissioners to be appointed by the said court to reconsider the subject matter thereof. And the said commissioners to whom the said report shall be so referred shall return the same report so corrected and revised, or a new report to be made by them in the premises, to the said court without unnecessary delay, and the same, on being so returned shall be confirmed or again referred by the said court in manner aforesaid as right and justice shall require, and so from time to time," &c.

4. The Act of 1871 conferred no new power upon the court in the premises. It only in effect required the officers of the city to act in presenting the alleged causes of complaint against the regularity and fairness of the proceedings to the notice and attention of the court, and made more liberal provisions for giving notice to parties concerned than would have been required under existing laws.

5. It is also made a subject of complaint on behalf of the plaintiff in error, that the Act of 1871 violated some constitutional provision, because the act undertook "to annul *his* award, upon the suggestion or proof of fraud, irregularity, mistake or over-valuation in any of the other awards."

(*a.*) If any such question can arise upon the plea (which we deny), it was discretionary with the court under existing laws to set aside the report in part or *in toto*.

(*b.*) The act did not undertake to annul plaintiff's award; it only called upon the court to exercise its well recognized jurisdiction in the premises.

(*c.*) How is the plaintiff's award exempted from the mistake, irregularity and illegal acts which infected the whole proceedings? There is no concession that the award in his favor was not tainted with the evils which poisoned those in favor of other persons. It cannot be assumed that the court would set aside the award, except, as it was authorized to do by the Act of 1813, "as right and justice shall require."

The justice at Special Term, in his opinion considering this objection, says: "But when I find such errors as I have mentioned; when I find many assessments and awards disproportioned to others, and some glaringly wrong, how can I say that if the commissioners had not erred in those particulars the other awards would not also have been different? How can I say,

that that which was but one proceeding has not been wholly poisoned when I detect fraud and illegality in some parts of it? How can I say that the same error which controlled their judgment in the instances I have mentioned, did not influence it in all their action? It seems to me obvious, therefore, that the only proper course is to order an entirely new assessment. By this no one can be harmed. If the report as it now stands, as to any particular individual, be right, of course it will remain the same in the new report; while, if it be wrong, it is a novel proposition, either in morals or to be heard in a court of justice, that that which is wrong should not in some method be corrected."

Third Point.

The learned counsel for the plaintiff in error calls attention to the provision of the Act of 1813, which declares that on the confirmation of the report of the commissioners, the city should be seized of the fee in the lands and premises, and that this investiture of the fee was and is absolutely conclusive upon all parties. Whether this would be so, in the absence of fraud, irregularity, &c., is immaterial, for the act of Act of 1813, was modified by the Laws of 1818, p. 196.

1st. By this modification the fee does not pass to the corporation without an acceptance of the land by some affirmative act of the Corporation, unless the Corporation neglects to accept during the fifteen months succeeding the confirmation of the report by the commissioners. If the Corporation neglects to pass the appropriate resolution to accept, the fee will not pass, at least until the expiration of the fifteen months.

Strang *v.* N. Y. Rubber Co., 1 Sweeny, 78.

2d. At the time of the passage of the Acts of 1813 and 1818,

the Constitution of the State of New York did not contain a provision prohibiting the taking of private property for public use without just compensation.

Cons. of 1822, art. 7, sec. 7.
" " 1846, art. 1, sec. 6.

In Detmold *v.* Drake, 46 N. Y., 318, the court held that the owner was entitled to the rent of the premises for the fifteen months after the confirmation of report, unless the Common Council should act under the Law of 1818, and prescribe a shorter time for the actual opening.

Hammersley *v.* The Mayor.
Affirmed by the Court of Appeals, May, 1874.

3. The counsel for the plaintiff in error argues that the Act of 1818 was not applicable to the Broadway widening proceeding, because by the Act of 1869 the commissioners, in their report, were required to designate the time for the actual opening. It is immaterial to the principle involved for the present question, whether the Common Council was left to designate the time under the Act of 1818, or the duty was imposed on the commissioners. The commissioners had the power to designate two years, or any other period longer or shorter, and during that time the city would not have had any right to the possession of the premises. Under either statute the right of possession and enjoyment and the fee remained in the owner until the arrival of the designated time.

4. Under a statute, passed in 1872, to provide for the condemnation of land for the Albany Park, the Court of Appeals determined that a vote of the Board of Commissioners to take lands for park purposes did not divest the title of the land owner, and is not of itself a condemnation of the lands, nor did the appointment of commissioners of appraisal have that effect. The title is only acquired on final confirmation of the report of the Commissioners of Appraisal, and on payment or deposit of the compensation.

In the Matter of Commissioners of Washington Park.
10 Abb., Law J., 315 (Nov. 10, 1874.)
Laws 1872, Chap. 45, p. 86.

State v Gravel, 19 Maryland 357
Avery v Fox, 1 Abb. U. S. R. 246
2 Kent 339, note
Cooley's Const. Lim. 651

Fourth Point.

The order of confirmation by the Special Term was not final and conclusive upon any of the parties to the proceeding at the time of the passage of the Act of February 27, 1871.

1. **There was a right to set it aside on motion for fraud, mistake, irregularity or illegality.**

On the decision of the appeal from the order vacating the confirmation of the report in this proceeding, the Court of Appeals uses the following language:

PECKHAM, J.: "In most cases of fraud, mistake or irregularity, an appeal would afford no relief, as the defect might and probably would not appear on the return to the appeal.

"There is no statute prohibiting the making of a motion for relief in such a case. It is generally the only remedy where other facts than the record presents are required to show the ground of relief. It is a conceded power of the court to hear such motions in ordinary cases of judgments or orders in suits there pending, and no reason is perceived why the court does not possess and should not exercise the like power in cases of this character.

"The provision of the statute that the report, when confirmed, shall be 'final and conclusive,' has reference to an appeal therefrom, not to the remedy by motion to set it aside for irregularity, fraud or mistake.

"That provision was aiming at a regular confirmation of a report, free from material fraud or mistake. It plainly never intended to give a vested interest in a mistake, an irregularity, or a fraud, whereby important rights of property were acquired or lost. It had reference simply to an appeal upon the merits, and is satisfied with that.

"All judgments are liable to be set aside for fraud, mistake or irregularity, and a vested interest therein is subject to that liability."

2. There was existing at that time, in behalf of any party to the proceeding, a right of appeal from the Special to the General Term.

3. The demurrer admits the allegation of the plea (fol. 22): "That prior to and at the time of the passage of the said act of the Legislature, the said order of confirmation in the declaration mentioned was, by the statutes of the State of New York, subject to review by the General Term of the Supreme Court, on the appeal being taken thereto by said Mayor, Aldermen and Commonalty, according to the course and practice of said court; and on the hearing of said appeal, said General Term of said court were empowered to reverse, modify or affirm the said order."

4. The learned counsel for the plaintiff in error, in his third point, elaborately argues that the admission made by the demurrer to the effect that the order of confirmation was appealable, was not the admis of a fact, and that, as matter of law, the order was not appealable.

We understand the admission as matter of fact, to be, that the order was appealable to the General Term.

A reference to the decisions of the Supreme Court and Court of Appeals will settle the question in favor of the right of appeal.

It is the every day practice of the General Term to entertain these appeals.

In the Matter of the Com. of Central Park, 4 Lansing, 467.

See 63 Barb 572

Under the Act of 1813 it was a mooted question whether the Supreme Court, in acting upon the reports of commissioners of estimate and assessment, exercised its powers as a court or as commissioners appointed by the Legislature.

But the question was settled in the year 1850, that the powers were exercised as a court.

Embury *vs.* Connor, 3 N. Y., 511.
See Stryker *vs.* Kelly, 7 Hill, 9, 14.
S. C. on Error, 2 Denio, 323.
Constitution, Art. 1, sec. 7.

Under the Constitution of 1846 a system of general and special terms was organized, and also a Court of Appeals. The jurisdiction of the Court of Appeals was limited. Very few of the decisions, except such as arise on appeal from final judgments in actions, can be reviewed by the Court of Appeals, and then only on questions of law. The General Terms "were designed not only for the redress of legal errors occurring at the Special Terms Circuits and before referees, but those of fact likewise. Hence a review of the facts may be held before the General Terms upon an appeal taken from the judgments and orders of the former courts. They were also designed to redress wrongs arising from an erroneous, arbitrary or otherwise improper exercise of discretion by the former.—*Per Grover, J., Matter of Duff*, 41 *How. Prac. R.*, 350, 353.

People v Freeman 52 N.Y. 656.
Vermilyea v Palmer 52 N.Y. 471.

In 1854 an act was passed, entitled "An Act in relation to Special Proceedings," ch. 270, Laws of 1854, p. 592, which provided

"Sec. 1. An appeal may be taken to the General Term of the Supreme Court, or the Superior Court, or Court of Common Pleas, of the city of New York, from any judgment, order, or final determination, made at a Special Term of either of said courts, in any special proceeding therein." Certain sections of the Code, regulating the mode of appeals, are applied to these appeals.

The effect of this statute was determined by the Court of Appeals in the following year.

In the matter of Canal and Walker streets, 12 N. Y., 406:

In that case the order of the Special Term, affirming the report, had been affirmed on appeal to the General Term. An appeal was taken to the Court of Appeals. On a motion to dismiss this appeal, the court determined—

1st. That an appeal did lie, by virtue of the Act of 1854, to the Supreme Court at General Term, from an order made by the same court at Special Term, confirming the commissioners' report,

2d. That no appeal would lie to the Court of Appeals.

Ch. J. Gardiner, p. 411: "We are all, therefore, of opinion that the Supreme Court, in reviewing the report of the Commissioners of Assessment at the Special Term, and in determining the questions of fact and law then presented, and in confirming that report, acted as the Supreme Court of the Constitution. That the appeal authorized by the Act of 1854 was to the same court in General Term; and that the final order of affirmance, the subject of this appeal, was made by the Supreme Court, 'having jurisdiction in law and equity,' and not otherwise."

See In Matter of Wall Street, 17 Barb., 617; Opin. of Genl. T., p. 636.

3d. In the case of King *vs.* Mayor, 36 N. Y., 190, Judge Davies uses this language: "We have no doubt that the order made in this matter was appealable to the General Term of the Supreme Court, and that the order or judgment which the statute declares to be final and conclusive is that which the Supreme Court finally makes in the matter." And it will be found that Judge Allen in his opinion (30 N. Y., 493) refers to the decision of the Supreme Court, evidently, in the same sense in which it is used here, to wit, as establishing the right of appeal to the General Term of the Supreme Court. There is no order now that can be made by the Special Term of the Supreme Court, which involves a special right or special question, which is not reviewable by the General Term of that court; and Judge Davies says, "Such has been the uniform practice in matters of this kind, and they being special proceedings within the meaning of the Code, an appeal lay from the order of the Special Term therein to the General Term. *This court has frequently declared such proceedings to be special proceedings, as designated by the Code, and recognized the practice of appeals therein from the Special to the General Term.* It was the duty of the General Term, therefore, to have heard the appeal, and not to have dismissed it." But as the case came before the court upon a writ of error instead of an appeal, the court dismissed the writ and left the party to his appeal.

4th. There is nothing in the case of "*The matter of the Central Park*, 50 *N. Y.*, 493, inconsistent with the law as it is declared in the two cases last quoted from. Not a doubt is suggested as to the accuracy of those decisions. Prior to that decision it had been several times determined that the orders in street cases were not appealable to the Court of Appeals. The counsel who moved to dismiss the appeal insisted that "the order of the General Term was final" (p. 494). The point of Judge Allen's opinion is that the *litigation is to be determined in the Supreme Court*, and he says, "there is an obvious propriety in confirming the *right of review to the Supreme Court*."

5. The Bowery Extension case (2 Abbt. Pr. R., 368, decided by a divided court, was disapproved by the same court, in *Pryor's* Appeal, 5 Abbt. Prac. R., 272, and distinctly overruled "In the matter of the Commissioners of Central Park," 61 Barb., 640.

See also Matter of Broadway Widening, 61 Barb., 483.

Also 63 Barb. 572

Two cases are referred to by the counsel for the plaintiff in error: In re 65th Street, 23 How. Pr. R., 256, and In re 76th Street, 12 Abbt. Pr. R., 317, which arose on questions of taxation of costs. They are not reported in the regular or authorized series of reports, and are necessarily overruled by the later cases above referred to.

Fifth Point.

Pending the right of appeal or review in a case, the Legislature has the right to order in what mode that appeal or review shall be brought, whether by bill of equity, by motion, or in some other manner, and by what tribunal it should be determined. The right of the party is not fixed and established, and is not a vested right within the meaning of the decisions,

until all the existing remedies for reviewing the matter have been exhausted.

1. "The Legislature, provided it does not violate the constitution prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or *modify* an existing remedy, or remove an impediment in the way of legal proceedings."

Hepburn *vs.* Curtis, 7 *Watts*, 300.

Schenley *vs.* City of Allegheny, 35 *Penn. State R.*, 29, 57, re-asserts this doctrine.

Cooley's Const. Lim. 387

In the matter of Beams, 17 *How. Pr. R.*, 459, the power of the Legislature to pass a statute authorizing the Supreme Court to set aside assessments on motion for fraud or irregularity, was held applicable to assessments imposed and confirmed before the act was passed. The counsel for the city argued that the person claiming that the assessment was irregular could only raise the question (as to previously confirmed assessments) by action. Judge Ingraham said:

"A full and ample remedy now exists by action against any one attempting to enforce an illegal assessment, although such remedy is difficult and not often resorted to, on account of its expense, and perhaps uncertainty attending a long litigation. The Legislature have, by the present statute, provided an easier, cheaper and more expeditious mode of attaining the same result.

"I can consider the proceeding as only affecting or adding to the remedy, and not interfering with vested rights, and in that view the statute should be sustained. My conclusions are that the statute applies to assessments made either before or after its passage; that in the present case the proceedings were irregular, and that judgment must be rendered, declaring such assessment vacated, and directing that the lien created thereby shall cease."

In Mechanics' and Farmers' Bank of Albany, on appeal from probate, 31 *Conn.*, 63, it was held that the right of a person to the remedies which the law furnishes for the enforcement of his rights, is not a vested right which may not be impaired by legislation, and that such remedies might be changed or taken away, although the rights of parties might suffer detriment from the change.

The case of the Baltimore & Susquehanna R.R. *vs.* Nesbit, 10 *How. U. S.*, 395, is analogous to the case now before the court. In that case the case the State of Maryland granted a charter to a railroad company, in which provision was made for the condemnation of land to the following effect, namely, that a jury should be summoned to assess the damages, which award should be confirmed by the County Court, unless cause to the contrary was shown. The charter further provided that the payment, or tender of payment, of such valuation should entitle the company to the estate as fully as if it had been conveyed. In 1836 there was an inquisition by a jury, condemning certain lands, which was ratified and confirmed by the County Court. In 1841 the Legislature passed an act directing the County Court to set aside the inquisition and order a new one. On the 18th of April, 1844, the railroad company tendered the amount of the damages, with interest, to the owner of the land, which offer was refused; and on the 26th of April, 1844, the owner applied to the County Court to set aside the inquisition and order a new one, which the court directed to be done.

The contract in that case was as complete as the one now before the court. The order of confirmation vested in the railroad company the right to make the tender, and thereby secure the fee of the property. It in all respects vested as complete a right in the company to secure the property by making the tender as was secured to the plaintiff in this case to sue for his money. But the court held that a law merely divesting antecedent vested right of property where there was no contract, was not inconsistent with the Constitution.

Judge Daniels says, in respect to the objection that the

Act of 1841 was unconstitutional, because it divested vested rights and in that way impaired the obligation of contracts. "It must certainly be shown that there was a perfect investment of property in the railroad company, and a subsequent arbitary divesture of that property by the Legislature, in order to constitute their proceeding an act impairing the obligation of a contract."

He determines that the Act of 1841, the constitutionality of which was attacked, was a proper exercise of the power of the Legislature to grant a new trial, and refers, with approval, to the case of Calder *agst.* Bull, 3 *Dall.*, 386.

A judgment of a court is not final when, by the then existing laws, the time for review and reversal for error has not expired. "The law which authorizes a judgment does not guarantee that it shall remain a valid judgment. It may be liable to reversal for error. If so reversed, the obligation of the contract is not impaired. The remedy by which that judgment was recovered is alone affected. If the time for commencing writs of error should be extended, and made applicable to cases in which no writ of error could by the existing laws be maintained, the remedy only would be affected, and yet the judgment might be annihilated. * * * * * * The obligation of the contract would not thereby be impaired." Mellen, Ch. J.

Colby *vs.* Dennis, 36 *Maine*, 13.

In accordance with this view, it has been adjudged that a judgment in a State court against a bankrupt, which has been duly appealed from by him, is not final within the meaning of the 21st section of the Bankrupt Act.

In re Metcalf and Duncan, 2 *Benedict*, 78.

2. In The People *vs.* Supervisors of Westchester, 4 *Barb.*, 64, relied upon by the appellant, the rights of the parties had become finally fixed before the repealing act was passed. The jury found the amounts to be paid, their verdict had been laid before the Board of Supervisors, who liquidated and settled the amounts in the same manner provided by statute, and their proceedings in that behalf

were not subject to appeal or review by any other tribunal. The land had been taken possession of. The owners had acquiesced and surrendered the possession. If error, mistake, irregularity or illegal act could be proceeded. No reassessment was ordered, but the Legislature repealed the act authorizing the improvement.

See Hamilton v. Commonwealth 19 Penn. 329 334

3. The award to the plaintiff was of no higher dignity than a judgment It was not final and conclusive, any more than a judgment would be when brought up upon appeal. If upon an appeal to the General Term the proceedings should be set aside and vacated, the title which the plaintiff claims vested in the Corporation on the confirmation of the report would be divested, the property would revert, a new award might be made, or the whole proceeding might be abandoned and discontinued.

Sixth Point.

The plaintiff had no vested right in the remedy by which the proceedings should be reviewed.

1. He could not claim that the review should be only in the form and mode of procedure which existed at the time the award was confirmed. It was within the power of the Legislature to extend the time for appealing, or to prescribe a new mode in which, or a new tribunal by which the proceedings should be reviewed.

In Ogden *vs.* Saunders, 12 *Wheat.*, at page 349, Marshall, Ch. J., says: "In prescribing the evidence which be received in its courts, and the effect of that evidence, the State exercises its acknowledged powers. *It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts,*"

In this same case, Ch. J. Marshall repudiates the argument which had been pressed upon the court, "that obli-

gation and remedy are identical, that they are synonymous —two words conveying the same idea."

2. The argument of the plaintiff must come up to the proposition that he had a vested right to require that proceedings should only be reviewed upon appeal. (See plaintiff's brief, p. 5.)

Such a proposition never has received the sanction of any court. The courts have repeatedly enunciated the rule, "that there is no such thing as a vested right in a particular remedy."

"The doctrine of vested rights never restrains a Legislature from advancing justice or remedying wrongs. It is intended to prevent oppression and injustice, and not to afford them impunity."

Freeborn *vs.* Smith, 2 *Wallace*, 171.

3. "There is no such thing as a vested right to do wrong, and the Legislature which in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority."

Parker, J., Foster *vs.* Essex Bank, 16 *Mass.*, 245.

4. "Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

Per Grier, J., 2 *Wallace*, 175.

It was accordingly held, that when Congress has passed an act admitting a Territory into the Union as a State, but omitted to provide by such act for the disposal of cases pending in the Supreme Court of U. S. on appeal, a writ of error, it might constitutionally and properly pass a subsequent act making such provision for them.

Freeborn *vs.* Smith, 2 *Wall.*, 160.

See Rich *vs.* Flanders, 39 *N. H.*, 304, 316.

An act of the Legislature authorizing bills of equity to

be filed to defeat usurious contracts was held applicable to contracts entered into and judgments obtained before its enactment as well as after, and was not a retrospective law in the sense in which the Constitution of Tennessee prohibited the passage of such laws, and did not create or defeat any right, but merely regulated the remedy.

Brandon *vs.* Green, 7 *Humph.*, 130.

The Legislature may always alter the form of administering justice, and may transfer jurisdiction from one tribunal to another.

Springfield *vs.* Hampden, 6 *Pick.*, 501.
Burch *vs.* Newberry, 4 *How. Pr. R.*, 145.
S. C. on Appeal, 10 *N. Y.*, 374.

In the case of the United States *vs.* Sampeyreac, Hempstead, 118, 7 Peters, 222, is given a construction of the Act of Congress, passed the 5th of May, 1830, entitled "An Act for the further extending the powers of the judges of the Superior Court of the Territory of Arkansas, under the Act of 26th May, 1824, and for other purposes."

Under the provisions of an Act of Congress passed on the 26th of May, 1824, proceedings were instituted in the Superior Court of the Territory of Arkansas, by which a confirmation was claimed of a grant of land alleged to have been made to the petitioner, Sampeyreac, by the Spanish Government prior to the cession of Louisiana to the United States by the treaty of April 3d, 1803. This claim was opposed by the district attorney of the United States, and the court, after hearing evidence, decreed that the petitioner recover the land from the United States. Afterwards the district attorney of the United States, proceeding on the authority of the Act of the 8th May, 1830, filed a bill of review, founded on the allegation that the original decree was obtained by fraud and surprise; that the documents produced in support of the claim of Sampeyreac were forged, and that the witnesses who had been examined to sustain the same were perjured. At a subsequent term, Stewart was allowed to become a defendant

to the bill of review, and filed an answer, in which the fraud and forgery are denied, and in which he asserts that if the same were committed, he is ignorant thereof, and asserts that he is a *bona fide* purchaser of the land for a valuable consideration from one John J. Bowie, who conveyed to him the claim of Sampeyreac, by deed dated about the 22d day of October, 1828. On a final hearing, the court, being satisfied of the forgery, perjury and fraud, reversed the original decree. *Held*, that these proceedings were legal, and were authorized by the act of the 5th of May, 1830. That almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is, in no respect, the exercise of judicial powers; it only organizes a tribunal with the powers to entertain judicial proceedings. The act, in terms, applies to bills filed, or to be filed. Such retrospective effect is no unusual course in laws providing new remedies.

Bench v. *Davis*, 16 *Barb., S. C. R.*, 192, *Syracuse;* Gudley, Justice, "These cases, and many more that might be cited, hold that acts are valid which give remedies where none existed before, through defects that would have been fatal had the Legislature not interfered and given a perfect remedy by curing intervening irregularities. In all the cases the language of the courts is that no rights are interfered that are vested in such a sense as to come within the rule which forbids the interference of the Legislature."

People v. *Tibbets* (4 *Cow.*, 385). A statute which altered the mode of proceeding in a suit pending when it was passed, and gave a speedier trial, was constitutional.

Burch v. *Newbury* (4 *How. P. R.*, 145). A provision for extending the time for taking an appeal is constitutional. It affects the remedy only.

That case was affirmed on appeal by the Court of Ap-

peals, in 10 *N. Y.*, 374, the prevailing opinion being given by Justice Welles, in which all the judges concurred, except Mr. Justice Gardiner, who dissented.

Judge Jewett expressed some views, which were purely *obiter*, in which his associates did not join; but even in his opinion the right of the Legislature to modify remedies, so long as they do not impair the obligations of a contract or disturb vested rights in property, is distinctly asserted (p. 393).

Grocer v. *Coon*, 1 *N. Y.*, 536. Judge Bronson giving the opinion that an act taking away the right of appeal in an existing suit was constitutional.

In re Courtlandt Palmer, 40 *N. Y.*, *p.* 561. After an appeal from the Supreme Court to the Court of Appeals from an order affirming an order setting aside certain assessments for local improvements in the city of New York, pursuant to chapter 338 of the Laws of 1858, the Code (§ 11) was amended by an act passed May 12, 1869, by which it was provided that "no appeal to the Court of Appeals shall be had or heard hereafter" from any order or judgment in any proceeding under the Act of 1858. Upon motion, the Court of Appeals dismissed the appeal, saying that the amendment was applicable to pending appeals, and was not unconstitutional.

In these cases, instead of altering or giving a new or different remedy, the Legislature took one away, thus depriving the party appealing of the right to review the order. But it was within the authority of the Legislature, because the principle is fully settled that there is no vested right to a remedy.

In *Jacquins* v. *The Commonwealth* (9 *Cush. Mass. R.*, 279), Chief Justice Shaw held a law to be constitutional which provided that upon writ of error on account of error in the sentence in a criminal case, the Supreme Court might render such judgment as should have been given below, and he said: "In the present case the court are of opinion that this act is not *ex post facto*, or retrospective in its leg-

islative action. It relates to future proceedings in writs of error in criminal cases, and it is not retroactive in an obnoxious sense, because it relates to writs of error on past judgments. It relates solely to remedies, and a writ of error is purely remedial."

It cannot be necessary to multiply citations upon this proposition.

The defendants in error submit that the decision of the Circuit Court should be affirmed.

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